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A FEMINIST REVIEW OF CRIMINAL LAW

by

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FOREWORD

This is not a general review of the criminal law with an added feminist dimension. It is an attempt to focus on the areas of criminal law which are of particular interest to women. Since all of the criminal law is of interest to women - as victims, offenders, friends, lovers, relatives of victims and offenders - some crude and suspect working classifications have been made.

The way in which these issues have emerged is crucial to feminist theory. It is important to stress the centrality of feminist practice, for many of the areas are dealt with here because women have organized around them. To the extent that the issues discussed have not been informed by feminist action and interaction then the analysis is poorer for it. Indeed, this study should be viewed not as the final word on the subject; but rather as a spark to more indepth analysis.

The basic value underlying the Review can be stated as a belief that women live in a patriarchal world, subject to male domination and control. The two relevant questions are therefore:

(1) to what extent should the criminal law be used as a means to combat the various manifestations of the subordination of women?, and

(2) to the extent that the criminal law itself is an instrument of male domination, how should it be reduced as a means of partriarchial control of women's lives?

In other words, how can the criminal law be used as a weapon against patriarchy and be reduced as a weapon of patriarchy? It may not in fact be possible to do both. Harnassing State power for women's purposes may (if it is possible) have some practical impact with respect to particular issues. Concern may be felt, however, that this is not empowering to women and fails to address the role of the State in furthering male interests.[1] Thus 'feminism has been caught between giving more power to the State in each attempt to claim it for women'.[2] Nevertheless, an attempt is made to address these issues here, without any assertion that law reform and the use of State power are any more than interim measures.

This attempt is made because it is important to bring to light the maleness of the perspective underlying the formation and application of the criminal law. General principles, and the search for them which forms so crucial a part of criminal law reform in this country, are looked at with suspicion to see if they reveal an androcentric world view - one equating the 'male' with the 'human'. Thus one of the major aspects of feminist method is the rejection of decontextualization,[3] i.e., feminists question abstractions which imply that gender is immaterial in the context of a world in which gender is very material.[4]

The establishment of a justifiable structure for criminal law cannot flow solely from academic legal analysis. What such analysis can do, however, is to reveal some of the implications of the choices that are made. An illustration can be found in the debate over the mistaken belief in consent defence to sexual assault. The mens rea abstraction may help to mystify and obscure the issues arising out of the specific context. In itself, the abstraction, or the interest in maintaining its purity irrespective of context, cannot give us an answer to the political question of what the law should be in this area. It is important to know, however, that the choice of a subjective mens rea in sexual assault law is a preference for the male's perspective of the event as opposed to the female's or that of any reasonable observer. This choice denies any male responsibility to seek an unambiguous consent to sexual touching and thus is a highly-charged political symbol of male sexual rights in a world in which women are relatively powerless.

Finally, the analysis presented in the Review is not a utopian dream of what would be culpable in a feminist State. The existing structure of the State and the criminal justice system are explicitly presumed, and therefore the reformist nature of the project is recognized.

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EXECUTIVE SUMMARY

This is a feminist analysis of areas of the criminal law which are of particular interest to women. The perspective is primarily that of integrative feminism: affirming differences between women and men, but without the acceptance of a 'natural' role for women and without the attribution of inferiority to women's difference. The fundamental questions asked are: how can the criminal law be used as a weapon against patriarchy, and at the same time be reduced as a weapon of patriarchy?

Many problems arise from applying to women a criminal law which has been devised by male legislators with a view to controlling anti-social acts committed for the very large part by men.

At the theoretical and ethical level, it poses problems of legitimacy and equity in the conception of the common good and social order: until now, defining these concepts has been the sole preserve of male definers.

At the practical level, it is necessary to study the concrete effects of penal sanctions imposed on a female population for whom the realities of life are different from those of men.

In order for an act to be legitimately considered a crime, it should meet the following specific criteria:

(1) the act must cause serious harm to others;
(2) the act must violate fundamental values and cause real harm to the community;
(3) the application of criminal law must not harm persons or society, and must not violate fundamental rights; and
(4) there must be reason to believe that qualifying an act as an offence can lead to a solution to problems caused by crime.

In Canada, 80% of the charges laid against women in recent years do not meet these criteria. In fact, non-violent theft of small amounts of money or objects of little value account for over 40% of their offences. Twenty-five per cent of female offenders are convicted for violations of provincial liquor laws, 7% are convicted for the mere possession of marijuana and approximately 5% are charged with breaking bail, disturbing the peace, prostitution, public mischief and so on. It is obvious to the authors that there is nothing 'criminal' about the majority of offences committed by women. Although it is true that the number of women charged with violent and serious offences has risen in Canada in recent years, these offences still account for only 5% to 10% of the entire phenomenon of female crime.

There is not yet a comprehensive feminist analysis of the purposes of the criminal law. The work so far has tended to be issue-oriented. A broad-ranging analysis of interests is important, however, if we are to evaluate the consistency of the present law and proposals for law reform.

A number of interests are presently protected, both by regulation and by the failure to regulate: the preservation of the State; property; life and physical safety; privacy; integrity of relationships and the status of marriage; freedom of expression; as well as other nebulous concepts such as sensibilities, feelings and morality.

All of these interests must be examined to see if they are protected in a way that is universal, yet sensitive to the concerns of each gender. In general, the interests recognized by the community as being important enough to be protected by the criminal law should be protected equally and without leaving one gender to bear a disproportionate share of the burden. For example, the lives and physical safety of women and men should be given equal value in the formulation of substantive rules.

CONSTITUTIONAL IMPLICATIONS OF CRIMINAL LAW REFORM

The present law and proposals for reform must be tested against the constitutional standards set out in the Canadian Charter of Rights and Freedoms, and in particular must satisfy the guarantees of equality contained in ss.15 and 28. But what is the definition of equality? Three definitions are discussed in this study. It could mean absolute gender neutrality. Alternatively, a qualified gender neutrality could be adopted, with exceptions based on real as opposed to imagined differences between the sexes. Lastly, these sections could render unconstitutional any criminal law which contributed to the subordination of women. All three approaches have some feminist support, but all may be harmful in the hands of decision-makers who are unsympathetic to women. The Charter will only be of assistance to women if used by Parliament and the judiciary to address the existing reality of the subordination of women.

Since there is as yet no settled meaning of equality, it is not clear whether gender-specific offences, such as statutory rape, offend the Charter. If such offences are removed, it should be because they contribute to the subordination of women, rather than that they 'discriminate' against men.

A major area where equality analysis is important is that of abortion. The abortion offences arguably offend s.15 (and possibly also ss.28 and 7) because they discriminate on the basis of economic status and place of residence. More importantly, the author concludes, these offences contribute to the subordinate status of women through the denial of reproductive control.

Section 2 of the Charter guarantees freedom of expression. The author argues that women have a special interest in this, particularly in the freedom to engage in political dissent and speech addressed to the need for fundamental changes in our institutions. Women may also have a special interest in control of the abuse of freedom of expression, especially in the context of pornography and incitement of hatred. There is, however, no consistent feminist position on the appropriate use of the law.

SUBSTANTIVE OFFENCES AND DEFENCES

Women as Accused Persons

There are a number of offences of particular significance to women as accused persons, including abortion, contempt, infanticide and prostitution-related offences.

In the author's view, the present abortion law denies women reproductive control in a context where women do not control their sexuality. It also creates unnecessary risks for the lives and health of women who do not have access to rapid, safe and legal abortion. The existing abortion offences in the Criminal Code should therefore be repealed. The Canadian feminist position does not depend on, although it is supported by, the liberal analysis of privacy which has lead to the legalization of some abortions under the U.S. Constitution.

The common law offence of contempt could be used to stifle women's freedom of expression to criticize the judiciary. This interest is more important than the interest in the reputation of the judiciary and the author contends that there should therefore be no form of contempt such as 'affront to the judiciary'. There is need to examine whether the contempt law applies more harshly against women than against men. In the meantime, she calls for a defence to a charge of contempt for refusal to testify that realistic protection is not available for the witness.

The author concludes that the existing law of infanticide is obscure, but serves a justifiable purpose. There are defects, however, in the construction of the offence. First, the Crown retains the discretion to charge with murder in which case there is no infanticide defence. Second, the law contemplates the conviction of a woman who has killed her baby while suffering from the effects of childbirth. It is proposed that this area of law be considered for reform in the context of the treatment of mentally-disturbed people.

With respect to prostitution, the author asserts that it is unconstitutionally and morally unjustifiable to punish women for soliciting and prostituting themselves in common bawdy-houses. Prostitution is a major aspect of the sexual objectification of women and prosecution doubles the oppression. The present law makes prostitutes more vulnerable to pimps. The law is unfair in the absence of criminalization of male harassment of women in the workplace and the street.

An examination of defences is necessary to determine if women's perspective is adequately addressed and therefore if women receive equal protection of the law from the imposition of criminal liability. The defences discussed are selfdefence, provocation, necessity, duress and medical explanations.

The law of self-defence is flexible enough to permit an examination of the situation from the accused woman's perspective, but this may not always happen in practice. Thus, women may be required to meet a standard which would only be justified in a society in which women fully enjoyed the protection of the law. The author therefore recommends that the law be amended to require the court to consider the particular accused's perspective, e.g., by asking if there were realistic alternative means which the accused could have used to protect herself or other persons.

The partial defence of provocation raises a similar problem with respect to a narrow focus versus an examination of the broader context. The author argues for the defence to be expanded to consider all factors which relate to the gravity of the provocation from the accused's perspective.

The defence of necessity recognizes a hierarchy of values in that the law does not appear to permit any defence relating to theft of food and drugs for children, squatting in empty houses in the case of homelessness, or welfare fraud. The author calls for a statutory defence of necessity ensuring a right to interfere with the property rights of others in order to feed, clothe and shelter oneself or one's children, according to the author.

Research is necessary to determine if the defence of duress is broad enough to incorporate the pressures that women actually experience. In the meantime, the defence should be interpreted in a more flexible manner for women who fight back against the physical violence of their partners and may have no other effective source of help and protection.

We are at an early stage in the development of medical knowledge about the nature of such conditions as premenstrual stress syndrome and the causative link, if any, between such conditions and anti-social behaviour. Recommendations for reform would therefore be premature in the author's view.

Offences Against Women

A number of criminal offences relate to the humiliation and degradation of women, the expression of hatred against them and their exploitation for sexual purposes. Pornography, hate propaganda, prostitution-related offences, sexual assault and sexual offences against vulnerable people are examined in this report.

There does not appear to be a feminist consensus on the appropriate response of the criminal law to pornography. There is, however, evidence that pornography is harmful to the people who appear in it, that it helps to maintain the subordinate status of women, and that it is offensive to some unconsenting viewers. There are valid arguments for and against the use of the criminal law as a response to these harms, but the author believes that on balance there is a case for intervention. The definition of pornography should be based on the concept of subordination, and at the very least, should include violent pornography.

An alternative criminal law response is to include sex in the 'incitement of hatred' offences. There is no guarantee, however, that such provisions would not be used against women, since the expression of concerns about patriarchy might be more readily construed as 'men-hating' than pornography construed as 'women-hating'.

It has already been argued that women must not be further victimized by prostitution laws. Beyond that, there is some divergence of opinion about the proper role of the criminal law. The author proposes that offences such as causing a disturbance be used to respond to the public nuisance aspects of prostitution but that this be closely monitored to ensure that such offences are not used in a discriminatory way. The recommendations of the Badgley Report with respect to child prostitution should be adopted, with the exception of the offence of soliciting. Children should not be punished for engaging in prostitution, the author argues. Rather, the focus should turn to improved social services and employment opportunities. She also believes that the offence of living on the avails of prostitution should be amended to apply exclusively to pimps. She considers an offence directed at customers only, but recommends it only if it forms part of a national campaign against prostitution, with economic initiatives to provide women with viable employment alternatives and public education on the harm in objectifying women and children.

The major initiative proposed by the author with respect to sexual assault is research to determine the effects of the 1983 Criminal Code amendments. Such research would focus on whether victimization of the complainant has been minimized and whether the reporting, prosecution and conviction rates have increased. The definition of 'sexual', the significance of violence, the concept of 'exercise of authority' and implied consent must all be monitored. The author recommends law reform to require that people engaging in sexual activity exercise reasonable care to determine consent and that people who are incapable of exercising such care are not simply acquitted.

The Criminal Code does not adequately protect particularly vulnerable people or those in relationships with a potential for subtle forms of coercion. Some special offences should therefore be retained, without extraordinary protections for the accused such as limitation periods and marital immunity. Gender-specific offences protecting young girls from sexual intercourse are justifiable in the author's view, in that female children suffer a unique harm specific to their sex from the insertion of a penis in the vagina.

Additional protection for all young people should be ensured with the offences of sexual contact and exposure proposed by the Badgley Committee. It should, however, be made clear that sexual experimentation between young persons is not criminal, and it should not be possible to charge the victims of incest.

PROCEDURE AND EVIDENCE

The procedure chapters examine the discriminatory impact of the criminal process, from the stage of laying an information and police investigation of criminal complaints, through the arrest and bail hearing stages, to the powers of the prosecutor to assume prosecution of private complaints or withdraw charges before the court. The impact of plea bargaining on women is examined, as well as aspects of the preliminary hearing. Each of these is analyzed to determine how the procedural structure may maintain a male-oriented criminal justice system, regardless of the gender-specificity of specific and substantive provisions.

Clearly much of procedure appears to be gender-neutral on its face. It is the practical impact upon women that must be examined. In this regard it is difficult to properly comment without data. Therefore, various hypotheses must be substantiated by major research and data-gathering projects. Issues such as the credibility of women as witnesses, lawyers and judges are targetted for examination. The author recommends affirmative action to ensure more representative appointments of women judges.

Particular areas where women have been singled out for special treatment are examined in the section on the law of evidence. These include recent complaint, competence and compellability of spouses, privileged communication, corroboration and evidence of past sexual conduct or reputation.

Some rules relating to sexual complaint prosecutions have been revised in recent years so that, e.g., the requirement for a recent complaint has been abrogated.

Spousal compellability and competence still raises some issues, particularly in light of recent law reform proposals. Similarly, the law underlying the privilege attaching to spousal communications is examined. Some authors argue that the spousal privilege is outdated and should be abolished, while others say it should be extended to include other intimate relationships.

The theory of law requiring corroboration of evidence in the prosecution of sex offences has historically reflected a very negative profile of women. Evidentiary rules pertaining to corroboration which in practice apply more to women must be reviewed in this light. Much of this law was abrogated by the 1983 law reform, but in some areas the impact is still detrimental to women. The author assesses these and recommends that corroboration not be required for any sexual offences.

Finally, the inherent weaknesses in the new evidentiary rules concerning the sexual history of a complainant in a sexual assault prosecution are examined. The author questions the relevance of such evidence and recommends studies to determine its impact on verdicts.

SENTENCING

The author analyses in detail the impact of long prison sentences on women, demonstrating that the equity of such sanctions is seriously eroded by the poor standards of penal institutions for women. She then examines non-custodial penalties (such as fines or probation), arguing that the apparent leniency of the courts toward women is fundamentally justified by the less serious nature of women's crimes and the lack of a previous criminal record. However, in regard to these lesser sentences, particularly fines, one should look at their impact on a group for whom economic marginalization increases on a daily basis. The author suggests that judicial discretion should be limited to a realistic framework when imposing fines. She also recommends, given their success and popularity, that courts resort as often as possible to sentences which encourage self-responsibility, such as community service orders, compensation in kind or in services, or restitution. The author also recommends that all human rights codes be amended to include 'possession of a criminal record' as a prohibited ground of discrimination.

A review of the literature regarding the apparent increase in crimes committed by women leads the author to the conclusion that such an increase does not in fact exist.

Although at first glance the offences for which women are given prison sentences appear to becoming more serious over time, the author asserts that the majority of crimes committed did not warrant long prison sentences, and that recidivism among female criminals is unlikely in the majority of offences against the person.

The author tackles inequalities of treatment in the criminal justice system at their source. An assessment of the studies on sex differentials in sentencing requires the reader to note, in effect, the abundance of works regarding sexism in the courts, e.g. of judges and lawyers. These stereotypes have a unique and important impact on the treatment of women in the criminal justice system. One of the suggested solutions is the adoption of affirmative action policies and programmes to include more women at every level of the administration of criminal justice.

PART I

CONTEXT OF THE STUDY

CHAPTER 1

INTRODUCTION

1.1 General Introduction

Why do we need a feminist study on criminal law?

In our democratic countries, criminal law should not be limited to the values that the State advances in support of its right to impose criminal sanctions. That is the mandate which totalitarian states give to their lawmakers. What distinguishes, or in principle what should distinguish, democratic systems from the others is the former's determination to ensure that criminal and penal laws truly reflect the fundamental elements of the collective social conscience. The criminal law of a democratic country must protect the values shared by the majority of its citizens, of both sexes, of all ages, of all ethnic origins, and of all social, educational and economic backgrounds.

Women have traditionally not been involved in defining these values. Male federal legislators have determined among themselves what constitutes crime: what are violations of the most sacred values. They have established among themselves the scale of sanctions that offences carry, thus defining the seriousness of the crimes and, consequently, the importance of the values violated.

We believe that a feminist perspective is needed. The Criminal Code, its procedures, the sanctions it sets down and the treatment that is specifically accorded for violations of the Code must be analyzed from the viewpoint of women, who account for over 50% of Canadians.

What do we mean by a feminist analysis?

In everyday language, a feminist analysis seeks to identify sources of discrimination and inequality based on sex. A feminist analysis includes proposals to create situations in which equality prevails in law and in fact.

With respect to the Criminal Code, a feminist analysis would consist, therefore, of eliminating all the definitions, rules and principles of penal practices which give rise to discriminatory treatment of women. It would include proposals to abolish from the Code all measures that result in inequality or special treatment.

However, in examining the Criminal Code, we believe we must go beyond this common understanding of feminist analysis. An analysis of criminal law carried out from a female viewpoint must seek to define the social order that created these laws. A true feminist analysis must therefore identify the male concerns and interests that have governed the definition of offences and the determination of sentences. This type of analysis must show, among other things, the values to which female legislators would give priority, the importance they would attach to the security of the person in relation to the security of the State and the manner in which the would ensure the advancement, and possibly the defence, of the values to which they have chosen to give priority. Although the thrust of this work is issue-oriented, it should be noted that theoretical analysis has been done in particular contexts. An important effort to draw that analysis together has been made by Prof. Kathleen Lahey.[1] She outlines the various tendencies in feminist analysis - egalitarian feminism, integrative feminism and critical feminism - as well as suggesting in a general way some of the implications of each approach for reform of the criminal law.

Egalitarian or liberal feminism has tended to emphasize formal equality and individual rights. Gender-based distinctions have been seen as a barrier to equal opportunity and hence the use of gender-neutral standards is a priority. This movement is closely associated with mainstream liberalism. The implications of this approach for criminal law reform are relatively easy to understand and have probably already been accepted, e.g., in the opinion that there is a need to change certain gender-specific provisions in the Criminal Code.[2]

Integrative feminism stresses women's specificity and goes beyond sexism to an analysis of the world and knowledge as patriarchal in nature. The leading exponent, Angela Miles, argues for a 'total integrative restructuring of society and human relations' around reproductive and gynocentric values.[3] The crucial aspect of this approach is that its claims are formulated and based on an understanding of the reality of women's lives at this particular time in history. The problem is of course that the affirmation of women's specificity has to occur without acceptance of the idea of a 'natural' role for women and without the attribution of inferiority to difference. This is basically the approach that is adopted in Part II of this review.[4]

None of these tendencies in feminist analysis is, however, a panacea. Consequently, the overall approach of this review is that each can be useful and can be adopted in particular circumstances.

1.2 Introduction to the Context

A critical analysis of criminal law from a feminist perspective reveals problems in three areas: morality, legitimacy and equality.

1.2.1 Problems of Morality in Criminal Law

As previously mentioned, the moral order that criminal laws seek to preserve was established through male consensus. With the rare exception of protests against sexist legislation, women have had no say in defining what is criminal and what is not. The exclusion of women from criminal law debates has enabled legislators to give priority to such values as private property and the security of the State and its officials at the expense of other issues, such as sexual equality, children's rights and the responsibilities of fathers toward their children. In a moral order established by men and women on an equal basis, priority will be given to different values or, in any case, values will be ranked differently.

1.2.2 Problems of Legitimacy in Criminal Law

The problems of the legitimacy of criminal law are based on two factors: the lawmaking process and the acts which are considered criminal offences.

1.2.2.1 The Lawmaking Process

The first factor that contributes to the illegitimacy of criminal law in our liberal, capitalistic democracies is the lawmaking process itself. Even before legislators address a certain issue, or when they begin to debate it, powerful lobbies and interest groups endeavour to influence their views. The members of their political parties, religious leaders, unions, police departments and lobbyists from large corporations attempt to persuade legislators to include measures that serve their interests and their power in the legislation to be passed.

Therefore, not only do male legislators determine among themselves what values should be protected, but it is under the influence of interest groups, the vast majority of which are composed of men, that fundamental issues are either placed on the agenda of legislative bodies (such as capital punishment, under pressure from police officers) or denied serious consideration (such as abortion, under pressure from religious leaders, among others).

Women are not alone in expressing concern over the inefficiency of the democratic process in the adoption of legislation. Political scientists and legal theorists[5] also acknowledge that the lawmaking process leaves little room for consideration of the common good, thus depriving laws of a substantial part of their legitimacy.

1.2.2.2 Grounds for Criminal Sanction

The second factor that contributes to the illegitimacy of criminal laws is the basis for qualifying certain acts as crimes. In some cases, laws deal with acts which are not harmful to others or to society, or in any case, not sufficiently harmful to merit criminal sanctions, which Beccaria reminds us should only be used with trepidation.[6] Once again, it is not only women who make this criticism. Great political philosophers of past centuries, such as Mill[7] and Montesquieu,[8] endeavoured to advance the principles of usefulness and economy that should guide us in defining crime, and more recently, many legal theorists and professionals have addressed the same issues. Allen,[9] Fuller,[10] Hart,[11] LeDain,[12] Miaille[13] and Packer[14] all recommend that we should not apply criminal laws to victimless crimes or to matters which are no longer the subject of a clear moral consensus. Similarly, the Law Reform Commission of Canada has proposed the decriminalization of obsolete crimes, of acts that cause no harm to the person and of minor offences against property.[15]

In order for an act to be legitimately considered a crime, it should meet the following specific criteria:

(1) the act must cause serious harm to others;
(2) the act must violate fundamental values and cause real harm to the community;
(3) the application of criminal law must not harm persons or society, and must not violate fundamental rights; and
(4) there must be reason to believe that qualifying an act as an offence can lead to a solution to problems caused by crime.[16]

In Canada, 80% of the charges laid against women in recent years do not meet these criteria. In fact, non-violent theft of small amounts of money or objects of little value account for over 40% of their offences. Twenty-five per cent of female offenders are convicted for violations of provincial liquor laws, 7% are convicted for the mere possession of marijuana and approximately 5% are charged with breaking bail, disturbing the peace, prostitution, public mischief and so on. It is obvious that there is nothing 'criminal' about the majority of offences committed by women. Although it is true that the number of women charged with violent and serious offences has risen in Canada in recent years, these offences still account for only 5% to 10% of the entire phenomenon of female crime.[17]

Is this to say that no form of constraint is justifiable for 80% of women charged with offences? The right to compel offenders to compensate the persons harmed, return their stolen property and help restore their well-being is completely justified. Civil and administrative measures appear entirely appropriate. Physical constraints or custodial sentences, however, are certainly not justifiable for women, no more so than for males, adult or juvenile, who are convicted of similar offences.

For the true crimes for which women are charged - robbery, breaking and entering, serious assault and homicide - the right to intervene can include physical constraint, but should not go so far as to include imprisonment when the crimes are completely situational and when the likelihood that they will be repeated is low. The rate of recidivism among females convicted of homicides is almost zero. Such crimes are committed within family relationships, and special, emotionally charged relationships. In an effort to make examples of such offenders, the criminal system may impose severe sentences, but it is not at all certain that, in the case of women, exemplary sentences serve useful and correctional purposes.[18]

1.2.3 Problems of Equality under Criminal Law

The treatment accorded to women under the criminal justice system is often unfair for three reasons.

(1) The most obvious reason is that penal institutions for women provide few of the services and programs that would facilitate their resocialization and that are available to men.

(2) The second reason is based on the fact that the majority of women who have brushes with the law are young mothers with young children. Their social status has a considerable effect on the way they experience imprisonment. Moreover, separation from their children, which becomes necessary since most penal institutions do not have child-care services, places a double burden on women. The payment of fines is also difficult for women who are single parents with low socio-economic and educational status.

(3) The third and most important reason is that the criminal justice system was created by men for men. Paternalism and sexism lead police officers, judges and counsel to treat women as children whom they are excusing, and to doubt their word when they come forward as victims.

Throughout this analysis, we refer to literature, facts and studies that address the problems of morality, legitimacy and equality faced by women under our present criminal law system.

CHAPTER 2

INTERESTS OF WOMEN WHICH SHOULD BE PROTECTED BY THE CRIMINAL LAW

2.1 Introduction

In this chapter the interests which ought, by feminist standards, to be protected by the criminal law will be identified. Protection can be offered in various forms: in the retention or introduction of a substantive offence, in the absence of any offence interfering with a particular interest, in the formulation of a defence, or in the administration of the law.[1] The focus here is on the contents and silences of the substantive law. The method involves a critique of interests presently protected.

2.2 Identification of Interests

It is important for women to engage in this analysis for a number of reasons. First, women may wish to criticize the inconsistency of criminal law, e.g. it purports to protect physical integrity and yet women are not always adequately protected. Secondly, we may draw analogies. Thus, if privacy is an interest worth protecting in some contexts, we may argue that it ought to be protected in others. Thirdly, an interests analysis gives us a theoretical framework in which to expand our discussion on particular issues and helps us gauge the results of law reform.

Apart from the work of Professor Lahey,[2] however, feminist scholarship in Canada has tended to be issue-oriented, and we do not at the moment have a comprehensive feminist analysis which would serve as a guide to law reform. In contrast, the stated government policy emphasizes the desirability of minimal criminal law,[3] thus making a feminist position on the content of that minimum all the more necessary.

2.2.1 Preservation of the State

The criminal justice system protects itself and the State of which it forms a part. Some of these offences include: contempt,[4] causing a disturbance,[5] public mischief,[6] assaulting a police officer,[7] obstruction,[8] sedition,[9] treason and associated offences,[10] murder of a peace officer[11] and riot and unlawful assembly.[12] There does not appear to be any literature analyzing these State-protecting offences from a feminist perspective.

To the extent that the State maintains the subordinate status of women and fails to use its power to change this, the interest in the maintenance of the present structure and the interest of women in change appear to conflict. Women, as a disadvantaged group, have a special interest in being able to express dissent. While it is unrealistic to suggest that the State co-operate in its own removal or radical reorganization, we must ensure sufficient protection for dissent and criticism. Women's interest can be protected by narrowing the scope of existing offences, and thus is consistent with a minimalist approach to criminalization.

2.2.2 Property Interests

Property interests are protected by such offences as theft,[13] fraud,[14] mischief,[15] currency offences[16] and by the recognition of the defence of property as a justification.[17] The operation of the patriarchal structure has ensured that women have relatively less access to property ownership than men (*i.e.* through the economic oppression of women and the whole institution of ascribed gender roles).[18] Thus, it is largely male interests which are being protected by the criminal law here.[19]

Women so far have tended to lobby for matrimonial law reform rather than use self-help[20] to achieve a more equitable distribution of property. It is possible that at some point in the future the criminal law might be used to control such attempts to acquire property without the assistance of the law, but the literature has not focused on this as an area for concern.[21]

When the concept of property is broadened, however, to include what has been termed the 'new property'[22] - including the right to social security, public housing and economic survival - a number of concerns for women emerge. *E.g.*, the law of fraud is used to protect the property of the State against welfare recipients. A conflict of interests arises if criminal law is used against women who 'defraud' the State while the State does not provide for women's basic needs. This raises concerns about the scope of the defence of necessity and the equal protection of the law.

While the criminal law cannot be enlisted to respond to all societal problems, the interests of men are better protected by the criminal law than those of women. The criminal law does not provide adequate protection for such economic interests as access to the workforce; a safe, non-sexist work environment; or protection from employment discrimination. Contrast the careful protection of traditional property interests (by and large for the benefit of men), with the minimal protection of the new property interests of women. What affects the economic well-being and security of both women and men? Is equal protection given to both? A broad-ranging inquiry is necessary to determine whether the selection of property interests worth protection is based on a double standard.

2.2.3 Protection of Life and Physical Safety

There are many offences in the Criminal Code protecting these interests, e.g. assault,[23] sexual assault,[24] homicide,[25] kidnapping and abduction,[26] arson,[27] driving offences,[28] neglect in childbirth,[29] offences relating to firearms[30] and to public order.[31] These offences enhance our freedom of movement, as fear of physical attack impedes our willingness to move around our environment. This interest has been recognized in s.7 of the Canadian Charter of Rights and Freedoms,[32] and when combined with s.28, the result is that women and men have a constitutional guarantee of equal liberty and security of the person. A minimum duty of the State is to ensure the maximum degree of physical safety for its citizens, since physical attack is probably the most intimate harm we can suffer.

Feminist analysis focuses on the effectiveness of the criminal law's protection, rather than questioning the norms themselves. However, substantive concerns arise when life/security protecting norms for men clash with the same norms for women. A major inquiry for any feminist review of the criminal law is whether women's lives and physical safety are given a high enough value. Abortion is a case in point. To the extent that criminalizing abortion creates physical danger for women, it can be argued that the criminal law selectively protects life and health in a gender-specific way. In other words, a choice has been made not to protect the lives and health of women, as a sex, in this context.[33] Similarly, to the extent that the criminal law does not protect against health hazards in the work-place, it is selective in a way that is negative to women.

2.2.4 Privacy

Privacy is a more abstract interest. There may be very different perceptions of what privacy is and whether it has been invaded. The criminal law does purport to protect privacy, e.g. overtly in the wiretapping offences[34] and indirectly in the failure to enforce domestic assault offences. The privacy interest can also be detected in decisions about what is not criminal, e.g. with respect to homosexual relations between two consenting adults in private.[35] Silence also reveals when privacy is not perceived as an interest, e.g. with abortion and the failure to protect the reproductive control of women.

The criminal law will inevitably place a value on privacy, in its utterances, its enforcement decisions and its silences. A serious attempt should be made to give universal protection to the privacy interests of both women and men, in a way that is meaningful and positive to both sexes.

2.2.5 Integrity of Relationships and the Status of Marriage

These interests may be revealed more in the areas of enforcement and evidence, but there are substantive protections too. Apart from bigamy,[36] s.289 of the *Criminal Code* exempts husbands and wives from being charged with theft during cohabitation. Section 23(2) indicates that 'no married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting the spouse for the purpose of enabling the spouse to escape'. Does such recognition contribute to the subordination of women by supporting the status of heterosexual marriage, the idea that the home is sacrosanct and the perpetuation of the notion that husband and wife are one person in law?[37]

The legal literature so far does not reveal any analysis of these issues.[38] It is nevertheless seriously questionable whether heterosexual marriage should be given any special protection by the criminal law. To the extent that any such provisions are retained it is not justifiable to draw distinctions between heterosexual marriage and other ongoing relationships. Thus, *e.g.*, if s.23(2) is justified it must be broadened to protect cohabiting couples, including lesbians. Female interests in integrity of relationships must be given equal protection.[39]

2.2.6 Freedom of Expression

While constitutionally entrenched in s.2(b) of the *Charter*, this is not granted express protection by the *Criminal Code*. Rather the interests in being protected from offensive and abusive speech are recognized. Thus there are offences relating to hate propaganda,[40] defamatory libel,[41] obscenity,[42] sedition,[43] contempt,[44] spreading false news,[45] perjury,[46] soliciting[47] and public mischief.[48] What is probably most interesting is the silence of the law in the sense that what is left unregulated is given protection.

The issue with respect to this type of negative protection is whether it avoids the criminalization of male speech which is harmful to women, as, *e.g.*, in the case of pornography and incitement to hatred of women. Thus the male interest in this type of freedom of speech may be given precedence over other interests.[49] There is not yet a feminist consensus on how these interests should be balanced.[50]

A further dimension to this issue lies in a comparison of the groups protected against abuse of freedom of expression. Groups identified by colour, race, religion or ethnic origin are protected against hate propaganda, at least on paper. Judges are protected against contemptuous abuse. But women are omitted from the protected groups. There thus may be discrimination in the range of groups chosen, so that women are isolated and required to bear an unequal burden of the harm done by certain types of expression. If freedom of expression is a substantial interest worth protecting, then the costs involved in protecting that interest should not be permitted to fall particularly heavily on women.

2.2.7 Sensibilities, Feelings and Morality

There are a number of offences protecting some even more amorphous interests, which might be described as interests in avoiding offence, distress, awareness that others are engaging in immoral acts which may be only damaging to themselves. Such offences include indecent acts,[51] nudity,[52] causing a disturbance,[53] neglect of a dead body,[54] and those in Part V (Disorderly Houses, Gaming and Betting). Possibly blasphemous libel,[55] hate propaganda[56] and obscenity[57] should be categorized in this way also. Again there has been no feminist analysis of the range of offences protecting the public from outrage, offence and distress.

It would be too simplistic to suggest that the law emphasizes the protection of male sensibilities while those of women tend to be neglected. It might be the case, however, that relatively conventional moral standards are utilized, while the feelings of marginal groups, such as feminists, are relatively ignored. What can be stated now is that women are not protected from encountering images of naked women in public, or from the sight of the market in human bodies or from sexually-explicit comments in the streets.

2.3 Recommendations

A range of interests purportedly receive some protection now. These interests may not be protected in a way that is universal, yet sensitive to the concerns of each gender. The Criminal Code has not, however, been subjected to comprehensive empirical and theoretical analysis from this perspective. At this stage therefore it is only possible to make some very general recommendations.

1. It is safe to predict that certain interests will continue to be protected, *e.g.* maintenance of the State, property and physical security. Such interests should be protected in a way that is universal, yet displaying sensitivity to the concerns of each gender. Specifically:

   (a) there should be more recognition of the rights of women to express legitimate dissent. To the extent that this conflicts with present State-protecting offences, these should be narrowed;

   (b) 'new' property rights, such as access to the work force and the right to an adequate standard of living, should not be treated as any less important than traditional property rights; and

(c) the lives and physical safety of women and men should be given equal value in the formulation of substantive rules.

2. Where more nebulous interests are protected, such as privacy, they should not be continued or discontinued without research on who will bear the costs of such a decision.

3. As long as such interests are protected they should be protected equally and without leaving one gender to bear an unequal burden of harm.

CHAPTER 3

CONSTITUTIONAL IMPLICATIONS OF REFORM

3.1 Introduction

A major aspect of any reform of the criminal law will, since the passage of the Canadian Charter of Rights and Freedoms,[1] be a consideration of the constitutional dimension. There are two aspects to such a discussion, since both present and proposed criminal law must be assessed in terms of the Charter.

This Chapter contains a number of elements. First, there is a theoretical discussion of the implications of constitutional equality rights for criminal offences and defences. Secondly, attention is focused on two areas in which the arguments with respect to the meaning of equality concentrate, i.e. gender-specific offences and abortion offences. Lastly, there is a discussion of other Charter provisions which are especially significant for women, such as ss.2 and 7. Equality is a thread which runs through this discussion too, as the implications of s.28 combined with such provisions must be considered.

3.2 Equality Rights

This section focuses on the conceptual content of ss.15 and 28 of the Charter.

3.2.1 The Meaning of Equality

There is a range of possible approaches to the meaning of equality. But since this has only begun to be explored in Canadian legal writing, it is necessary at this stage to look to the analysis developed in other countries for some sense of the choices which will have to be made.[2]

Different classifications are possible, but the following is a summary of the categorizations used here:

(1) absolute gender neutrality;
(2) gender neutrality with exceptions based on real, as opposed to imagined, differences between the sexes; and
(3) the subordination principle.

The leading exponent of an absolute gender neutrality approach is Prof. Wendy Williams, who argues the case in her much-quoted article The Equality Crisis: Some Reflections on Culture, Courts and Feminism:[3]

> Do we want equality of the sexes - or do we want justice for two kinds of human beings who are fundamentally different? ... Are feminists defending a separate

women's culture while trying to break down the barriers created by men's separate culture.[4]

She would reject distinctions, e.g. based on the idea that women are more vulnerable than men at certain times.

The view that s.15 of the Charter requires the eradication of overt distinctions between men and women has considerable support. Politically it can be placed in the liberal feminist tendency and embodies a view of equality that is formal in nature. Prof. Kathleen Lahey states in her paper Implications of Feminist Theory for Direction of Reform of the Criminal Code:[5]

> Very roughly speaking, the concept of gender neutrality is meant to accomplish much the same thing that earlier race neutrality provisions were meant to accomplish in the United States, by prohibiting considerations of race - or now, of gender - from being taken into account in allocating rights, duties or benefits under the law. The basic purpose of the gender neutrality approach to defining women's rights and duties is to ensure that in no context is gender considered to be a sufficient basis for differential (i.e., discriminatory) treatment.

There seems to be considerable acceptance of this approach at the political level,[6] and much of the attention arising out of the need to bring the Criminal Code into conformity with s.15 has focused on the small number of gender-specific offences.[7] A number of organizations concerned with the status of women have supported the move to gender neutrality in the Code. This could indicate straightforward acceptance of gender neutrality as a principle, or it could be evidence of a more sophisticated analysis of the desirability of gender-neutral drafting of laws attuned to women's experience of the crime in question or the criminal process.[8]

There is not unanimous feminist or non-feminist support for the notion of absolute gender neutrality, although it is sometimes presumed that feminist equality theory involves a refusal to acknowledge the relevance of sex.[9] Some feminist theorists have, however, concentrated on when exceptions to gender neutrality are justified.[10] This theoretical stance could result in a variety of applications, depending on how much difference is taken to justify different treatment. Thus, only biological exceptions may be contemplated, though a range of genuine (as opposed to stereotypical) social, psychological and economic differences could be added. This approach would appear to have most in common with integrative feminism, in that emphasis would be placed on the recognition but equal valuation of difference.

Prof. Catherine MacKinnon, who prefers the subordination principle, argues against this 'differences' approach on the basis that it permits the treatment of women as inferior; whether the differences between men and women are real, or based on false stereotypes. She suggests instead that the issue is one of male supremacy: to be equal is to be non-subordinated. The systematic relegation to inferiority is what is wrong. The inferiority of women can be seen in differential access to legitimacy, authority, pay, effective protection and bodily integrity. Male supremacy has been so embedded in our society that it has rarely needed affirmative laws to support it. But positive State action is needed now to bring it to an end. The subordination principle allows attention to be focused on such issues as violence against women, sexual assault, prostitution and pornography, rather than making it theoretically possible for women to commit certain crimes, which seems to have been the crux of government policy so far. As the debate about equality is presently framed it is difficult to raise these areas as equality issues, and yet they are a fundamental part of women's subordinate position in Canadian society. Until the law speaks with an effective voice on these issues, it can hardly be said that women have 'the equal benefit of the law'.[11]

It is suggested that the subordination principle[12] be adopted, whether or not judges decide it is constitutionally mandated, as a general guiding principle in reform of the criminal law. This position is taken for a number of reasons.

(1) It has the benefit of involving theory as informed by history, reality and women's experience of inequality. Discrimination at this point in Canadian history involves the subordination of women, not the making of distinctions on the basis of sex (although of course, the former will sometimes take the form of the latter). Taking a crime that men commit and making it gender-neutral is not 'removing' gender discrimination, while passing effective laws which increase the physical safety of women would do so.

(2) While there are weighty arguments in favour of gender neutrality, it has severe limitations as an equality principle. The positive side is that it is simple and achievable. It is entirely rational for women to have a deep-rooted fear of distinctions. Until women share in the control of the legal and political systems it might be wise to accept this idea of equality. Further, in the vast majority of cases, classifications of male and female are unlikely to reflect accurately classifications of needs or culpability. In the criminal law, abortion and rape would be clear examples, but once one leaves the relatively clear realm of

biological differences one can only make generalizations and not draw absolute distinctions. It is even difficult to isolate pure biological differences, since our biology has complex social and economic implications. On the negative side, gender neutrality is nearly useless to women in the field of criminal law. It can be of no benefit to women to be theoretically capable of committing crimes which women rarely, if ever, commit.

The use of a gender neutrality standard may be harmful to women, if it interferes with laws which focus on women's real problems and how we experience reality. An illustration can be found in the decision of the New Brunswick Court of Appeal in Chase v. The Queen.[13] The judges decided that touching a female's breasts was not a 'sexual' assault since breasts were secondary sexual characteristics. To include breasts would therefore require the inclusion of beards, likewise secondary sexual characteristics. This seems an excellent example of abstraction to a gender-neutral level even where gender is a significant part of the context. Even though it is possible to come to a gender-specific understanding of the meaning of 'sexual' within the context of a gender-neutral sexual assault law, surely the move to gender neutrality must at least have discouraged this.

Further, an insistence that s.15 requires that women and men be identical in the eyes of the law ignores existing biological, social and economic inequality. To put it simply, mandating formal equality (i.e. that men and women be treated identically) in a world of real inequality, is to maintain inequality, not eradicate it. The question here is whether s.15 requires the removal of gender hierarchies or simply gender differences.

Lastly, with respect to gender neutrality, an insistence on this standard with respect to the formation of legal rules may have repercussions at the application and results levels of equality analysis. Although sexual assault is gender-neutral, the reality remains that men are accused persons. A gender-neutral results analysis (such as the one used with respect to the application of the soliciting offence in s.195.1 of the Code) informed by a gender-neutral formation of rules analysis, could lead to the ridiculous argument that the sexual assault laws are unconstitutional since overwhelmingly applied against males. It seems clear therefore that real differences have to be taken into account at the application/results level and may hold out the hope of charges beneficial to women at the rule-framing level as well.

(3) The third argument for the subordination principle lies in the inadequacies of the differences approach. Recognition of real differences may in fact invite the perpetuation of differences, e.g., may allow the continuing discrimination against women under the guise of 'protective' legislation and the perpetuation of stereotypes. In essence both a gender neutrality and a recognition of difference approach can be used against women. Gender neutrality may be a vehicle to deny women's reality, while recognition of differences may simply invite double standards. That is no doubt why many feminists have felt more security in gender-blind rule-making. In a world where women are not making the rules, a serious concern arises that difference will simply mean continued inferiority.

This pinpoints the problem with all theories of equality: that their implementation does not lie in the hands of women. Conceptual analysis in itself has little power against patriarchy. It is clear that any theory can turn in on itself and be used to deny real progress for women.[14] It is not therefore possible to identify one feminist theory which will forever hold out real hope for women.

It is not therefore suggested that one equality theory should be accepted to the exclusion of all others. While it is not a complete answer to inequality, gender neutrality has a value in that gender is rarely an efficient means of classification. The differences approach enables attacks to be made on false stereotypes. Both approaches will be harmful, however, if they are not informed by an overriding comprehension of inequality as the subordination of women.[15]

Does existing case law provide any clue as to the approach favoured by the judiciary? There is a considerable amount of guidance on this, as the Canadian Bill of Rights[16] contains a concept of equality and it has been applied to existing gender-specific offences in the Code. In R. v. Rae,[17] e.g., it was held that 'statutory rape' offences (e.g. s.146) were not discriminatory, but merely embodied a differentiation on the basis of biological composition. Early Charter cases do, however, conflict. While s.146 has been applied in R. v. Gallant[18] and R. v. Joudrey[19], it has been struck down as discriminating on the basis of sex in the Ontario District Court decision in R. v. Lucas.[20] There the Court indicated that there was no justification for such discrimination in s.1 of the Charter, no psychological or sociological evidence having been given to justify different protection for females.

3.2.2 The Scope of Section 15

A number of issues, other than the meaning of equality, will have to be addressed. They will simply be mentioned briefly here along with proposed positions for law reformers.

Are lesbians protected by s.15 of the Charter? Sexual orientation is not listed as a ground but the section should disallow any arbitrary distinctions by government. There are at present no offences specifically aimed at lesbians, but some may be applied in a discriminatory way and thus need clarification, e.g. ss.157 (gross indecency) and 169 (indecent acts). Further, the high age of consent for what would otherwise be acts of gross indecency (s.158) could be used against lesbians in a discriminatory way.[21] In our view, s.15 requires a uniform age of consent for heterosexual and homosexual acts and a clear indication that public displays of affection between lesbians in public is not criminal.

Will the effect of s.15 go beyond the face of the legislation itself and require equality in the impact of the legislation? While U.S. courts have generally held that effects are constitutionally significant, irrespective of intent, equality rights have been an exception.[22] There has been some tendency to urge that we adopt an analysis based on disparate impact irrespective of intent here in Canada. While s.15 will have little real power unless the courts are willing to look at impact, some principles embodying a test of outcomes will have to be developed before this is really feasible. In an environment where equality is construed to mean sameness, a doctrine stressing equality of effect could be dismissed as unworkable. After all, it would be ludicrous if a male accused could argue that the sexual assault law was unconstitutional because of its disparate impact upon men. Differences in outcomes have to be permitted where they promote equality. From a feminist perspective, the best test seems to be whether the differences in results contribute to the subordinate status of women.

A much more contentious question is whether s.15 requires positive action on the part of government. In other words, is the government constitutionally required to introduce legislation tackling the actual problems that women experience, simply because they are women? While it is unlikely that it will be interpreted in this way, there is an argument which ought to be taken seriously here. Section 15 says women have a right to the 'equal benefit of the law'. The law speaks through its silences as well as its positive utterances, and men can benefit from the silence of the law in various respects. Its silence, in the sense of its ineffectiveness, allows continuing violence against women and children. Furthermore, the law is largely silent on pornography as degrading and dangerous to women. As long as these silences continue, women can hardly be equal citizens.

Does s.15 cover judicial decision-making, so that judges are prohibited from applying constitutionally valid rules in a discriminatory way, or generally from participating in any discriminatory process or decision? The arguments have been discussed by Prof. Smith,[23] and in our view judges must respect the values embodied in the Charter, as must other branches of government.

A major issue is of course the scope of s.1, which serves to uphold an infringement of a Charter right or freedom where such a limitation is a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. Section 28 should prevent it from being used in a discriminatory way. This begs again the question of the meaning of equality, and therefore s.1 should not be used in a way that contributes to the subordinate status of women.

Some of these issues require further analysis with respect to the specific issues to follow.

3.2.3 Equality and Gender-Specific Offences

Sometimes a provision will make a clear distinction between men and women on its face, which may be difficult to discern because our statutes are usually drafted in male language. The federal Interpretation Act[24] gives judges the power to choose whether 'he' includes 'she' in any particular context. Nevertheless, it is clear that some offences are indeed gender-specific. What is probably the best-known example can be found in the 'statutory rape' provision in s.146(1) of the Code.[25] The question of whether this type of offence offends s.15 will depend on the meaning of equality chosen.[26]

The Canadian Bill of Rights cases favour upholding such distinctions,[27] and indeed it may be reasonable to many to accept a biological exception to any rule outlawing gender-based distinctions. Thus a serious argument could be made that s.146 protects a unique biological characteristic of female children, as presently framed, since only females have vaginas. Penetration of a vagina may cause a unique harm to females because it can cause pregnancy, which imposes a severe decision on a female, either to bear the child or abort it, both of which carry risks. The Badgley Report on Sexual Offences Against Children has figures on the special risks to female children of pregnancy and abortion and recommends the retention of some gender-specific crimes to address this problem.[28] If the offence were generalized to cover all sexual contact, then a biological exception would be more difficult to justify.

One could argue, however, for a broader exception, i.e. one including other real differences, such as social ones, to protect a gender-specific sexual touching offence, as well as the existing seduction offences. Thus conceivably distinctions could be based on the social significance of the coercion and authority which permeate heterosexual relations.

If one were willing to go this far, one could make an argument justifying all these offences on the basis of the realities of sexuality and power in our society. The argument is put in one article:

> To be sure, the singling out of women probably reflects sociological reality: in this society, young women, who learn both that marriage is a most important goal for them and that they may pursue it only passively, are undoubtedly more susceptible than young men to the lures of persons who want to take sexual advantage of them. Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman ... than ... to a young man ...[29]

The authors go on to say, however, in the context of the Equal Rights Amendment (ERA), that it forbids finding legislative justification in the sexual double standard, and requires such statutes to be framed in terms of the general human need for protection rather than in terms of crude sexual categories. This is a powerful argument. Only physical characteristics can be said with any assurance to be unique to one sex, and it is difficult to distinguish physical characteristics from their social and economic context. If one extended exceptions to gender neutrality to psychological, social or other characteristics, this would seem to be an invitation to perpetuate the reality in which inequality presently exists: the 'double standard'.

It is even debatable whether biological differences justify distinctions. While s.146(1) could be said to be protecting the young female vagina from penetration by a male organ, it may well contribute to the subordination of women in that it treats females as passive, their sexuality as being a commodity to be protected, and thus forms part of the pervasive objectification process.[30] Thus s.146(1) is arguably unconstitutional not because it discriminates against men, but because it perpetuates negative images of women.

So here one might reject the biological argument and accept the view that a gender classification as a proxy for some other individual or social characteristic is impermissible. Young males need protection too, or at least the law ought to say that they do because the sexual double-standard forms part of women's subordinate status.

The arguments are simply canvassed here, the point being only that there does not appear to be a simple answer to the question of whether gender-specific offences offend s.15. In addition, whatever the answer given, the reasons for it are important from the perspective of the development of constitutional jurisprudence. In other words, we could get the right answer for the wrong reasons.[31]

An interesting contrast to male-specific offences is infanticide in s.216 of the Code. As a female-specific offence this raises similar issues. Here child-birth is specific to women while penetration of a vagina with a penis is specific to men. It might be argued, however, that s.216 is constitutional while s.146 is not. It is submitted that if one sees this offence as in essence a defence, justifying a lesser penalty for causing death - i.e. if it is a type of diminished responsibility defence based on our knowledge of post-partum depression - then it is justified because it is based on a real biological difference and does not contribute to stereotypes and the subordinate status of women in society. In fact, the failure to make special provision for mothers in this context might constitute discrimination.[32]

3.2.4 Equality and Abortion

The point that biological difference might or might not justify distinctions can be made again in the context of abortion. Section 251(2) of the Code is female-specific. A superficial analysis would be that s.15 of the Charter forbids gender classifications, but that clearly such a classification conforms with biological reality here, so it is justified. But the issue goes much deeper than that. The argument would be that the whole package of abortion offences discriminates against women by denying women reproductive control and thus helps to maintain the subordinate status of women. Anything other than the complete repeal of s.251 would be unconstitutional if one took that approach.

Whether or not one is of the opinion that the repeal of s.251 is constitutionally mandated for that reason, there are other serious equality problems with this provision.

There is, e.g., the argument that s.251, in its effect, discriminates against certain women on the basis of their economic status and their place of residence. This will provide some practical illustrations of the issues discussed earlier.[33] First, can s.15 be applied to the effects of rules inoffensive on their face? Secondly, what can be added to s.15 as non-enumerated grounds?

On the first issue, Bender discusses the U.S. experience in his article comparing the Charter to the U.S. Bill of Rights.[34] One of the examples he uses is the classic one of minimum height and weight requirements which eliminate most women. He states that in the U.S. the equal protection clause provides an exception to the general rule that effects are constitutionally significant, regardless of intent.[35]

Canadian courts have seemed unwilling even to consider effects. Attention has been paid to this in the context of abortion itself. In the early Morgentaler cases, Chief Justice Laskin addressed the argument that the abortion law offended the equality provision in the Canadian Bill of Rights, i.e. the law did not give the same advantages to all sections of the Canadian community, enabling individuals to 'avail themselves of it in whatever part of Canada they may be and regardless of their economic status'. He denied review on that basis, indicating that it was a reach for equality by 'judicially unmanageable' standards:

> I do not regard s.1(b) of the Canadian Bill of Rights as charging the courts with supervising the administrative efficiency of legislation or with evaluating the regional or national organization of its administration, in the absence of any touchstone in the legislation itself which would indicate a violation of s.1(b) ...[36]

This was quoted and adopted by Mr. Justice Parker in the most recent Morgentaler case.[37] Thus the operation of the Bill of Rights has been confined to consideration of the face of the legislation.

It is possible that in view of its much more comprehensive wording, s.15 will be given a broader interpretation by governments and the judiciary. Much evidence is available on the uneven access to abortion facilities.[38] This is one area where the evidence of disparate impact would be relatively easy to show. But, an interpretation confining the operation of s.15 in the manner in which the Bill of Rights was confined would be perverse.

Secondly, there is the issue of the grounds of discrimination. Neither economic status nor place of residence is enumerated in s.15. There may be tremendous judicial reluctance to recognize poverty as a ground of discrimination, but again that does not preclude the government from doing so as a policy matter. The implications are so tremendous as to make this extremely unlikely, but the merits of the argument in this context could provide a powerful political argument for the repeal of s.251.

U.S. courts have certainly been very reluctant to recognize poverty as a ground of discrimination, although there has been some recognition of this as a suspect classification in the criminal justice and voting areas.[39] The abortion issue is, however, directly addressed in Maher v. Roe.[40]

> An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to non indigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.[41]

There is very little indication of what the reaction might be to place of residence as a suspect classification. Yet in one recent Nova Scotia case, Basile v. A.-G. Nova Scotia,[42] the Court upheld a law which restricted salesman licences to residents of Nova Scotia. Although this dealt with the issue of mobility and not equality, it seems clear that the Court was very easily satisfied of the legitimate purpose of the legislation.[43]

If the above cases provide any basis for predictability at all, then one must conclude that Canadian courts are unlikely to strike down s.251 as offending s.15. But Parliament also has an obligation to respect the Charter, so the argument can be made in that forum as well.[44]

3.3 Other Charter Rights

Section 2(b) of the Charter, guaranteeing freedom of expression, is of significance to women in a number of ways. As a disadvantaged group, women have a special interest in freedom of expression, particularly political dissent and speech addressed to the need for fundamental changes in our legal and political systems. The literature to date has tended to focus on freedom of expression in the context of pornography, with feminists both rejecting limitations on freedom of expression[45] and justifying them.[46] A consistent feminist position is not revealed either in feminist literature or practice.

It is evident that major areas remain to be analyzed, particularly freedom of political expression.[47] It can safely be assumed that feminists would be interested in a close scrutiny of all offences designed to limit such freedom, since women have a particular interest in being free to express complaints about male behaviour in a world where such complaints are often viewed as illegitimate. Defamatory libel can be used as an illustration.[48] A feminist analysis would lead to support of the Law Reform Commission's suggestion that defamatory libel offences should be abolished.[49] Criminal prosecution should not be available as a technique for silencing women who speak out against oppression and thus harm the reputations of individual men.[50]

Two points can therefore be made. First, further feminist debate is necessary before there can be any consensus on the scope of freedom of expression with respect to pornography. Secondly, analysis is necessary on the potential threat posed by the criminal law to freedom of feminist expression generally.

Constitutionally, alternative approaches are possible. It can be argued that freedom of expression is not absolute but is limited in scope, feasibly to political expression.[51] This could be attractive to some feminists in that it should protect feminist political expression but not pornographic sexual expression. (It would not, however, give constitutional protection to feminist sexual expression.) Conversely, a broad interpretation could be urged for s.2 of the Charter, while s.1 is used to justify regulation, e.g. of pornography in the interests of such people as unconsenting viewers[52] and children.[53]

It is not yet possible to identify a feminist stance on what constitutional arrangement would best balance the various competing values, except perhaps on the very general level that it is important not to throw the freedom of expression baby out with the pornography bathwater. This freedom has a value for women even though it has been used against them. Finally s.28 of the Charter should have the effect of guaranteeing equal freedom of expression to both women and men.[54]

3.3.1 Vagueness of Criminal Prohibitions

Arguably it is unjustifiable for the State to punish someone for behaviour not clearly defined as criminal in advance.[55] This argument now may have a constitutional dimension because of the guarantee of fundamental justice in s.7 of the Charter. A related argument is that where s.1 of the Charter is being used (as it might well be in the case of pornography offences), limitations must be 'prescribed by law' and thus could well be attacked on the ground of vagueness.[56] This issue has not yet been subjected to feminist analysis, but women could develop an interest in vagueness in the criminal law for two reasons.

First, any pornography offences (and perhaps others such as incitement to hatred) may be struck down as offending s.7, or as failing to satisfy the requirements of s.1. Whether or not this is because a double standard might be applied with formulae familiar to the judiciary such as 'unlawful' or 'indecent act' being accepted, while unfamiliar provisions addressing women's concerns are rejected, offences will have to be carefully drafted where innovative attempts are being made to tackle old social problems. There may well be an irreducible minimum of vagueness in legislation. This will only be accepted by the judiciary if there is some willingness to tolerate a degree of uncertainty as opposed to the continuation of the social problem concerned.

Women may be denied protection because of uncertainty in a second way. E.g., it may become necessary to be more explicit about the term 'sexual' in sexual assault, if an unrealistically narrow interpretation is given.[57]

3.3.2 Sections 7 and 28 of the Charter Combined

Section 7 raises issues other than vagueness mentioned above. One major question for women is whether 'security of the person' includes a right to a minimum standard of living.[58] If accepted, this could provide a defence for welfare fraud cases.

When s.28 is combined with s.7, this makes possible the argument that certain aspects of criminal law and practice deprive women of their 'equal' rights to liberty and security of the person. In other words, where women are primarily the victims of certain offences, the primary one being sexual assault, they are in effect not receiving the 'equal protection' of the law under s.15.[59]

3.4 Recommendations

1. Section 15 of the Charter should not be interpreted as simply requiring the gender-neutral formulation of all offences and defences. Rather the test should be whether, as formulated, they contribute to the subordination of women, taking into consideration the results of such offences and defences.

2. In order to achieve the reality of the equal protection of the law (s.15) and equal rights to liberty and security of the person (ss.7 and 28), particular attention should be paid to areas where the criminal law is now silent.

3. This approach should be taken irrespective of whether it is felt to be constitutionally mandated by s.15, or whether it is felt that the judiciary will find it to be constitutionally mandated.

4. Sections 251 (procuring miscarriage) and 252 of the Code (supplying noxious things) should be repealed.

5. The freedom of expression guarantee should not be interpreted as standing in the way of pornography regulation.

6. Particular attention should be paid in the criminal law review to offences which might be used to silence women, in the sense that they may be afraid to complain of male behaviour or express political dissent.

PART II

SUBSTANTIVE OFFENCES AND DEFENCES

CHAPTER 4

WOMEN AS ACCUSED PERSONS

4.1 Introduction

There are a variety of reasons for discussing the crimes in this chapter. First, the crimes themselves may be a vehicle for the social control of women, whether or not women appear in significant numbers as accused persons in the criminal justice process, e.g. procuring a miscarriage.[1] Secondly, an offence may be significant because it can only be committed by a woman: infanticide[2] falls into this category. Thirdly, the form of the offence may pose a particular problem for women, e.g. contempt.[3]

Where an individual is charged with an offence, the issue of guilt does not depend solely on whether her actions can be judged to fall within the definition of the offence. Defences form an important part of the process of deciding culpability, and like offences, provide important insights into our values as a community. Thus the second part of this chapter focuses on the range of excuses and justifications and the issue of whether they should be reformed to make them more responsive to the reality of women's lives. These defences basically are the legal expression of a political intuition as to the community sense of what makes an action, otherwise wrong, non-culpable. If that intuition has been historically male and the 'community' in question is perceived as male also, then perhaps more women-oriented defences should be developed.

4.2 Offences

The offences discussed here are abortion, contempt, infanticide, prostitution-related offences, and public mischief.

4.2.1 Abortion

The present abortion offences are contained in ss.251 (procuring a miscarriage), 159(2)(c) (offering to sell abortifacient drugs) and 252 (supplying a noxious thing) of the Criminal Code. Procuring or attempting to procure a miscarriage for another person is one of our most serious offences in that the maximum punishment is life imprisonment. The woman herself is liable to be convicted of a less serious offence. The exceptions are cumbersome and within the control of the medical profession. An analysis of the details can be found in a paper by Sharon

Walls, entitled Abortion Law and Improved Abortion Services.[4] There are a number of ways in which the present system could be tinkered with,[5] but the feminist perspective goes beyond fine-tuning to total repeal of the abortion offences.[6]

The feminist writing reveals the following analysis. While abortion might not be practiced at all in a feminist society, the position now is that women must have the power to choose to have an abortion or not.[7] A number of feminist scholars have linked the issue of abortion to the broader question of sexuality in a context of gender inequality.[8] Women do not have control of sexual intercourse, the most common cause of pregnancy. Nor do women control the social meaning of birth control.[9] Women therefore need the power to make decisions about abortion: not so they can have control over their sexuality, but because of their lack of control.

Andrea Dworkin forcefully describes the coercion implicit in heterosexual intercourse in a society in which women are subordinate:

> The first kind of force is physical violence: evident in rape, battery, assault.
> The second kind of force is the power differential between male and female that intrinsically makes any sex act an act of force: for instance the sexual abuse of girls in families.
> The third kind of force is economic: keeping women poor to keep women accessible and sexually compliant.[10]

Reproductive control must be linked to freedom not to have sex (as opposed to the 1960s sexual liberation idea of freedom to have sex) and fundamental change in our society that removes the power differential and other forms of force.

A major aspect of the feminist position is the concern about the lives and health of women who do not have access to rapid, safe, legal abortions. There are a number of ways in which the present restrictions create health risks:

(1) Abortion is safer than giving birth. Seven women died in 1982 from complications associated with childbirth, down from 23 in 1981. There were no deaths associated with induced abortions from 1975 to 1982;[11]

(2) Delay dramatically increases the health risks of abortion. In 1982, the complication rates per 100 therapeutic abortions increased from 0.7 in the first nine weeks of pregnancy to 26.5 after 20 weeks.[12] Canadian statistics show that unlike in the U.S., where clinic

procedures are legal, many abortions here are performed in the second trimester;[13]

(3) Abortions performed in free-standing clinics are at least as safe as those in hospitals[14] (as well the overall cost is cheaper for society and more convenient for the user); and

(4) When safe procedures are not available, women resort to self-induced and illegal, unsafe abortionists despite the risks to their health and lives. When a liberal abortion law changes to a more restrictive one, deaths and complications increase markedly.[15]

The Badgley Report on the Operation of the Abortion Law clearly linked increased availability of abortion to increased safety for women, pointing out that the 1969 reform had a dramatic effect:

> The number of deaths of women for Canada resulting from attempted self-induced or criminal abortions, which averaged 12.3 each year between 1958 and 1969, dropped to 1.8 deaths annually from 1970 to 1974. In 1970 there were five maternal deaths due to illegal abortion in Canada, one in 1971, one in 1972, none in 1973, and two in 1974.[16]

One should not conclude from this that the present situation is satisfactory, as there remains a demand for abortions which increasingly remains unmet in Canada. In 1982, 3,156 Canadian residents had abortions in the U.S., up from 2,651 in 1981.[17] These figures do not, of course, reveal the stress and financial worry associated with travelling to have an abortion in a foreign country, nor the numbers of women who did not have the resources to choose this option. This raises a further powerful argument for repeal. The present law is inequitable in that it forces poor women who cannot afford to travel to have an abortion to choose between an illegal abortion close by or having the child. The present law permits abortion for some women only, and delays it for them. Related to the detrimental effects on the health of women is the stress associated with the uncertainty as to the possibility of obtaining an abortion or not.[18]

A further factor in the analysis is the rejection of the power of the medical profession to control such important decisions in a woman's life as the decision of whether and how to bear a child:

> Some feminists have noticed that 'our right to decide' has become merged with an overwhelmingly male professional's right not to have his professional judgment second-guessed by the government.[19]

This is particularly important with respect to the debate about life, since the major anti-abortion argument is that the foetus is a human life. Whether or not the foetus is a form of life, the issue is who should have the power to make decisions about what will happen to it: the State, an anti-choice minority, the medical profession or women themselves? Feminists would entrust women with these decisions, including, and perhaps especially, if they are life and death decisions.[20]

There are further arguments for repeal which are non-feminist in nature, but which can be used to reinforce the feminist argument.

Since many women will have abortions anyway, then the criminalization of this activity will inevitably create a situation in which the norms underlying the criminal law are not shared, and in fact are actively disapproved of by a part of the community. This always poses a problem for the criminal law, as its effectiveness depends to a very great extent on the acceptance and voluntary co-operation of those it is supposed to control.[21]

It is inappropriate for doctors to make the decision, in any case, since it involves an issue with social, economic, political and moral dimensions.

A liberal argument is that in denying abortions the State is invading a legitimate sphere of private choice and autonomy. There does not seem to be any analogous situation in which the community expresses norms conflicting with individual wishes which have such far-reaching and intimate personal effects.

The American jurisprudence tends to support this liberal argument about privacy.[22] The U.S. Supreme Court has held, in Roe v. Wade,[23] that abortion laws which exempt from criminality only a life-saving procedure on the mother's behalf without regard to the stage of pregnancy violate the Due Process Clause of the 14th Amendment, which protects the right to privacy. The State has, however, legitimate interests in protecting the woman's health and the potentiality of human life which become compelling at a later stage. Doe v. Bolton[24] is particularly relevant, since the Court struck down procedural conditions such as accredited hospitals and abortion committees.[25]

The feminist view does not rely on this American privacy analysis, however. First, this analysis does not recognize the principle of effective equal access to abortions.[26] This flaw is entirely consistent with a privacy analysis: women can privately decide to have an abortion, and they can privately be too poor to choose to have one.[27] Secondly, the privilege of those who can afford to have an abortion ceases with viability, and with technological advances, this limitation is eating away the reproductive control of American women. Thirdly, the argument that such a privilege has been recognized in the U.S. is dangerous as such recognition is tenuous and may change with conservative appointments to the Court.

Nevertheless, a closely-associated jurisdiction has struck down as unconstitutional provisions similar to our own. Indeed this very fact obscures the dimensions of the hardship caused to Canadian women by the restrictions on abortion here.[28]

If it were accepted that the abortion provisions should be repealed, two questions would remain. Should there be an offence of advertising ineffective or dangerous abortifacient drugs or devices? While this might become necessary if a problem developed, such offences are unjustified at the present time. Should there also be additional protection (other than existing offences such as causing death or bodily harm by criminal negligence[29] and the duty to use reasonable skill[30]) for women from quacks, physicians with low standards, and those who rarely do abortions? Assuming the removal of vulnerability based on urgent need, there does not seem to be any special factor in this case which would justify special protection. The public needs general protection from unlicenced or inefficient people practicing medicine and this is a matter for regulation by the provinces. Should such regulation go beyond protection to denial of freedom of choice, then no doubt provincial law would be subject to criticism, which is beyond the scope of a criminal law review.

4.2.2 Contempt

Contempt is a non-statutory offence[31] and thus is not defined in the Criminal Code. While there is no legal writing addressing contempt from a feminist perspective, obviously it raises a number of concerns for women.[32]

A major issue is that of freedom of expression with respect to the criticism of the judiciary. Any criminal offence which might be used to stifle comment on the anti-women bias of persons in authority, such as judges, should be scrutinized carefully. There is now a public right to criticize as long as no aspersions are cast on the motives of the judge,[33] and as long as there is no intent to bring scorn on the court.[34] Although it is obvious that women who criticize judicial decisions and statements are thus at risk of being punished for contempt, it has been recognized that punishment for contempt not in the face of the court should only be used with great caution.[35]

There are legitimate reasons for limiting freedom of expression relating to criminal trials, especially the need to protect the accused from prejudice. Should it be contempt, however, to criticize the judge (what the Law Reform Commission calls 'affront to judicial authority')? In a recent case there was public concern about judicial comments on the sexual assault of an exotic dancer. Women demonstrated outside the court with signs saying 'Second Class Judge' and 'Censure Judge Bowlby'. The complainant suggested the remarks were sexist.[36]

The Law Reform Commission states the complacent assumption that in 'practice, a judge will not hesitate to withdraw from a case if his impartiality is in doubt in the least'.[37] It proposes that the law of contempt continue to include affront, without any defence of truth. There is, however, no evidence to suggest that misogynist judges do remove themselves from cases involving women, and it is vital that women feel free to complain publicly about injustice. This freedom is more important than the reputation of individuals, as is recognized in U.S. jurisprudence. There, only statements presenting a 'clear and present danger' to the fair adjudication of a case are punishable as contempt.[38]

Furthermore, two related issues arise with respect to refusal to testify. The witness may refuse to testify because she fears the accused;[39] or, alternatively, may be concerned about the damage her testimony may do him and/or their relationship.[40]

With respect to fear, there are too many unknown factors to make proposals at this stage. The law of contempt might work more harshly against women than against men because women may be physically more vulnerable to threats. Adequate resources may not be devoted to their protection. Guilty persons may be acquitted because women are treated as being less credible and so will be in a position to carry out their threats. If these assertions were substantiated, then it would hardly be legitimate for judges to punish women for taking the rational step of refusing to testify in order to protect themselves. The question therefore becomes who should bear the risk. Since the State is in the best position to conduct research, it should bear the burden of establishing that women can be adequately protected. Persons should therefore not be convicted of contempt for refusing to testify unless the State can satisfy the court that realistic protection is available for the witness.[41]

Refusal to testify for the purpose of protecting the accused or a relationship is a more complex issue. It requires some understanding of the psychology of women as compared to men and their differing moral development, as well as some analysis of the obligations that the State can legitimately impose on the individual. It should be remembered that this issue could arise both where the woman/witness is herself the victim of the crime and where some third party is the victim. It may well be that the community is justified in punishing the woman where a third party is involved, while the issue is more complex where the witness is prepared to sacrifice herself for the accused.

The ground-breaking research of Carol Gilligan has revealed differences in the moral development of men and women[42] in that women progress through identifying good as self-sacrifice to good as an attempt to being responsible for self as well as others.[43] More women than men can be found at the level of equating good with self-sacrifice. How should the law respond to this difference? It is a crucial issue since, if the law could be detected as punishing women for doing what they believe to be the 'good thing', then the law itself should be questioned as representing the moral standards of a minority.[44]

There are further arguments on both sides. There are other areas where the law recognizes the interest in protecting existing relationships.[45] By analogy, there ought to be a defence to contempt that a person is refusing to testify against another person with whom they have an ongoing relationship. It would be ironic in the extreme if wives suffered because of such a principle (*e.g.*, in the categorization of wife abuse as private and domestic and thus beyond the scope of the criminal law) and did not get the benefit of it also. Surely, in the most meaningful sense, this would not constitute the 'equal protection of the law'. On the other hand, to recommend a relationship defence to contempt is to endorse the view that relationships are more important than public order. This cannot always be the case.[46] *E.g.*, a relationship involving abuse is hardly worth protecting, and its protection may even encourage abuse. Such a defence would need fine-tuning in terms of what relationships there was a public interest in recognizing. From a feminist perspective these would be non-violent relationships involving equals. Such relationships would be difficult to recognize[47] but should include friendships and lesbian relationships, as well as heterosexual cohabitees.

There is no feminist research or consensus on this issue as yet, so conclusions are premature. Research would be useful, however, on the way women and men identify the moral dilemma of testifying against a close friend or lover.

4.2.3 Offences Relating to Child-birth

Infanticide is a form of culpable homicide, prohibited by s.216 of the *Code*,[48] carrying a maximum sentence of five years imprisonment.[49] Section 590 allows a conviction even though some of the elements of the crime have not been established by the Crown, e.g. if the Crown has not proved that the balance of the accused's mind was disturbed.[50]

The issue to be discussed here is not constitutionality,[51] but whether infanticide ought as a matter of policy to be removed or reformed in some way. It is drafted in a bizarre way as it is an offence with the appearance of a defence. There is no feminist commentary on it, but there is likely to be consensus that women who kill their children while suffering from the effects of post-partum depression ought not to be charged with murder.

The present law, while attempting to achieve this, has three defects. First, the Crown still retains the discretion to charge with murder, in which case there is no 'infanticide' defence (i.e. there is no concept of diminished capacity). Secondly, the effect of s.590 is that a wilful killing by a mother could be dealt with more leniently than a wilful killing by a father, since s.216 only applies to females. There seems to be no constitutional justification for this. Thirdly, the law contemplates the conviction and possible imprisonment of a woman who has killed her baby while suffering from the effects of childbirth. Treatment for depression would seem a more appropriate response.[52]

It is difficult to correct these flaws, as changing the offence into a defence would oblige the Crown to proceed with a more serious charge. Adding a defence along similar lines might also have the same effect. Further, the provision of treatment is a much larger problem than can be dealt with in this particular context. Our proposals are therefore somewhat negative: that no change be made in the law that requires or promotes the bringing of murder charges against women who kill their newly-born babies,[53] and that this area be considered for reform as part of the law relating to the disposition of mentally-disturbed offenders.[54]

Other offences in this category relate to control over the act of giving birth itself. Section 226 creates an offence of neglect to obtain assistance in childbirth,[55] while sections 203 (causing death by criminal negligence) and 204 (causing bodily harm by criminal negligence) can be used against women in the home birth context. There does not appear to be any research on the effects of these offences on the decision to give birth at home, although considerable attention has been paid to the medicalization of childbirth.[56] It seems reasonable to speculate, however, that their existence has a negative impact on the control of women over decisions relating to birth. Although no cases can be traced, charges have been laid against mothers and mid-wives,[57] and the publicity surrounding these may well form part of this system of control.

Despite the absence of research into the effects of these offences, two suggestions can be made. First, such offences should include a statement that the fact of having a baby at home cannot per se be treated as evidence for the prosecution. Secondly, in the context of criminal negligence, a comparison can be made to other serious offences, with respect to the elements of culpability. Lower courts have persisted in using an objective test of liability when interpreting criminal negligence,[58] while a subjective test is deemed appropriate with respect to sexual assault.[59] Thus women may be held culpable for negligently harming their babies, while men will only be held culpable for recklessly harming women.[60] This is the kind of broad-ranging comparison which should be conducted in order to ensure equal protection of the law for women.

If criminal negligence were clearly defined as requiring recklessness in the subjective sense,[61] then women would be less vulnerable to prosecution and conviction under ss.203 and 204, and this double standard would be removed.

4.2.4 Prostitution-Related Offences

Prostitution is discussed briefly here, although it is more fully and appropriately discussed under the following chapter on Offences Against Women. Historically a number of offences in this group have been used to control the behaviour of women. The question from a feminist perspective is whether any such control is justifiable.

The relevant offences in this chapter are ss.195.1 (soliciting) and 193 (keeping a common bawdy-house).[62]

The feminist writing in this area is not completely consistent in the view that the law should not engage in this type of control of women. The National Association of Women and the Law has proposed the removal of the soliciting offence and the amendment of s.193 to allow prostitutes to run their own businesses.[63] The Canadian Advisory Council on the Status of Women has, however, suggested a new offence covering all pressing and persistent solicitations in a public place, thus condemning the singling out of women.[64] The Fraser Report[65] which respectfully discusses the feminist presentations to it and was clearly influenced by some of them, makes similar recommendations. It proposed that s.195.1 be repealed[66] and that s.193 be replaced with a section which permits two adult prostitutes to work in a place of residence.[67]

In our view, section 195.1 should be repealed and s.193 amended to enable individuals to use premises for the purposes of prostitution. To the extent that women commit other offences relating to prostitution *(e.g.* living off the avails (s.195(4), procuring (s.195) or causing a disturbance (s.171)) they should be held criminally responsible.[68] They should not be defined, however, as criminal offenders for responding to the male demand for sexual services, for the following reasons:

Section 195.1 is subject to serious constitutional challenge both as construed and as applied.[69] While 'prostitute' now clearly includes males,[70] there is still a conflict in the case law as to whether customers can be convicted. The B.C. Court of Appeal, in *R.* v. *Dudak*,[71] held that since the offence was one of offering sexual services for hire the customer was not culpable. On the other hand, the Ontario Court of Appeal, in *R.* v. *DiPaola*; *R.* v. *Palatics*,[72] held that a male who offers a pecuniary reward to a female for the purpose of satisfying sexual desire is soliciting.

While it would be an easy matter to correct this legislatively,[73] it would not be desirable to do so. First, this would not guarantee equitable enforcement, and unless a reasonable amount of confidence can be felt about this, Parliament should not retain an offence of colourable constitutionality only. The idea that prostitutes constitute the problem is so deeply embedded that it would be impossible to frame an offence which would be genuinely neutral in its impact. Secondly, it is not morally justifiable to punish prostitutes for activities associated with prostitution (unless they are exploiting others.) There are various reasons for this. The present law makes prostitutes more vulnerable to pimps and a criminal record only makes it more difficult for them to switch to other kinds of work. In the present economic climate, economic discrimination against women and female responsibility for children forces some women to turn to prostitution. The present bawdy house laws then deny them a place of work. It is unfair to criminalize persistant solicitation while male harassment of women carries no criminal sanction. Prostitution is a major aspect of the sexual objectification of women, and prosecution will simply mean that women are doubly oppressed.

Further, there is little if any evidence that these offences address any real social problem. Research in the Badgley Report (children) reveals that people willing to buy and sell sex have subtle ways of communicating with each other. Thus males are rarely solicited against their will.[74] It seems clear, however, that there are aspects of this issue other than the justification of punishing prostitutes themselves.[75]

4.2.5 Public Mischief and Related Offences

There are certain offences which can be used to punish people who improperly use the criminal justice system. Defamatory libel is one possibility. Another is public mischief, in s.128 of the Code.

The concern here is that offences of this nature may be used against women due to our system's perception that women lack credibility. We have been unable to discover any research or material on whether charges or threats of public mischief have been used as a response to, *e.g.*, accusations of sexual assault or police brutality.[76] Proposals are premature, but it is suggested that this area deserves in-depth research.

4.3 Recommendations

1. The existing abortion offences should be repealed (*i.e.*, ss.159(2)(c), 251 and 252 of the Code), and the provinces should be left to establish any relevant health standards.

2. There should be no form of contempt concerning affront to the judiciary.

3. Individuals should not be punished for contempt for refusing to testify out of fear unless the State can prove that realistic protection is available.

4. Research is necessary on male and female perceptions of the moral dilemma of testifying against a friend or lover.

5. Existing infanticide law should not be altered to the disadvantage of women, but should be considered for reform as part of improvements relating to the disposition of mentally-disturbed offenders.

6. With respect to ss.226, 203 and 204, a clear statement should be made in the Code that home birth *per se* is not evidence of guilt.

7. Criminal negligence, in the context of birth, should be defined to include recklessness only.

8. Section 195.1 should be repealed.

9. Section 193 should be amended to permit individuals to use premises for the purpose of prostitution.

4.4 Defences

The underlying theme of the following sections of this Chapter is whether the present range of defences provide sufficient recognition of a woman's perspective to justify the conclusion that this area of law provides equal protection from the imposition of criminal liability.

4.4.1 Self-defence

A particular range of situations with a common theme is identified here as the focus of discussion. A woman is attacked or feels threatened by another person (whether a stranger or someone known to her). She defends herself and is charged with one of the homicide or assault offences. Probably the classic instance of this scenario involves the woman who has been abused by her partner for many years and finally kills him. It is important to stress, however, that the facts can take other forms:[77] a victim of incest kills her father or a rape victim seriously injures her attacker. The crucial question here is whether the present law permits an assessment of the facts from a male perspective only. If this were the case, it would have very serious implications. On the constitutional level, the law of self-defence would arguably offend both ss.15 and 7 (combined with s.28) of the *Charter*. On the political level, it would mean that women were being treated particularly harshly for killing or assaulting their male assailants.[78]

There has been considerable discussion of these issues in the U.S., and it is not impossible to bring the woman's perspective to the attention of the court. A leading article is entitled *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*.[79] *State v. Wanrow*[80] is provided as an illustration therein:

> Acknowledging the threat to equal protection inherent in the failure to include a woman's perspective in the law of self-defence, the court noted:
>
> > (This instruction) leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men. The impression created - that a 5'4'' woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2'' intoxicated man without employing weapons in her defence, unless the jury finds her determination of the degree of danger to be objectively reasonable - constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law. The respondent was entitled to have the jury consider her actions in the light of her

> own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination' ... Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defence instructions afford women the right to have their conduct judged in the light of the individual handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.[81]

The authors identify a number of factors which must be brought to the attention of the court: women's perceptions of danger, the need to use weapons, the prejudice to women in narrow time restrictions, the deceased's reputation for violence and rage as a legitimate response to attack.[82]

The law of self-defence should require the court to examine the facts from the perspective of the accused. Canadian statute law,[83] while obscure, gives plenty of scope to arguments that require the recognition of her perspective. In essence, the law is that one can defend oneself if one is reasonably in fear and the response is reasonable. Section 37(1) of the Code is particularly broad in that it speaks of the prevention of assault rather than simply the response to it. This is particularly important for women as the law should be broad enough to protect the woman who has been subjected to a series of assaults and who acts to prevent a further assault.

Some of the case law supports an interpretation of self-defence which would cover this situation. Thus in Lowther v. The Queen,[84] the accused had killed the deceased, who had repeatedly threatened to kill the accused and had even attempted to do so, in order to prevent an assault. There had been a renewed threat on the morning of the death. Casey J. indicated that the trial judge should have asked the jury to decide whether he had reason to be apprehensive and whether he had taken all reasonable measures before resorting to force.[85]

The law should therefore be flexible enough to be responsive to women who are attacked and specifically to battered women. The decision of the Nova Scotia Court of Appeal in the recent case of R. v. Whynot (Stafford),[86] however, shows that this is not the case.

The accused was charged with the first degree murder of her common law husband, a large, powerful and violent man. After a day of drinking, the deceased threatened to burn down a neighbour's house and 'deal with' the accused's 16 year old son. The accused shot him while he was asleep in his truck. There was considerable evidence of the violence of the deceased and the accused testified that she was at her wit's end since he had threatened to kill all the members of her family should she leave him. The trial judge left s.37 to the jury and she was acquitted.

On appeal the Court set aside this acquittal,[87] finding that, in the absence of an imminent assault, it was improper to leave self-defence to the jury at all. This gloss on s.37 denies to the jury the opportunity of considering the self-defence argument within the whole factual context. This might be justifiable if in fact the accused had not exhausted all other reasonable measures, but insisting that self-defence not be left to the jury means that this question cannot even be asked.

This decision judges women according to a standard which would only be justified in a society in which women fully enjoyed the protection of the law. In other words, the moral right to punish a woman for responding violently to violence is premised upon the provision of the protection of the law in reality as well as on paper. To do otherwise is to impose the standards of a 'civilized' society on someone who is literally living in a lawless world.

One serious problem with the law of self-defence therefore, is the possibility of an insistence upon an imminent attack, irrespective of context. Even if s.37 were redrafted to permit the examination of context, however, the problem still remains of perspective. The jury may well have acquitted the accused in Whynot because the deceased was notorious locally and they had no difficulty seeing things from her point of view. This will not always be the case.

Again there is case law which explicitly requires the court to consider the facts from the accused's perspective. In R. v. Marky,[88] it was stated that consideration should be given to the facts as the person using the force would reasonably appreciate them. If one could be confident that this would be applied irrespective of gender then the law would not be in need of reform.

It is, however, extraordinarily difficult to see things from the perspective of a person of another gender, and the law of self-defence shows some signs of being male-oriented. Thus there is no absolute duty to retreat in the face of an attack[89] and there is evidence of a 'man's house is his castle' type of reasoning.[90] In contrast there is no evidence of a mechanistic approach to proportionality in the sense that the response has to precisely match the attack. Thus the courts do not insist that a weapon cannot be used against an unarmed attacker.[91]

The law of self-defence should therefore be structured so that the situation must be assessed from the perspective of the accused, and that judges not be permitted to focus on the facts immediately associated with the death to the exclusion of all the facts which legitimate the fear of the accused person.

Two approaches are possible, although neither are entirely satisfactory, in our view:

On the one hand, an entirely subjective test could be adopted. Did this accused believe that she was in danger and that the force she used was necessary? In our view this ought to be adopted as long as subjective tests are retained for other serious crimes. A man ought not to be acquitted of sexual assault when he honestly, but unreasonably, believed the victim was consenting, while a woman is convicted of murder where she honestly, but unreasonably, believed the force she used was necessary. It would still be necessary, however, to identify certain factors which would aid the court in trying to see the facts from the perspective of the accused. This is discussed under the second possibility since whichever question is posed - what did the accused think or was the accused reasonable - the court will need the same assistance in putting itself in her shoes.

The second approach, the present law, mixes subjective and objective tests as, e.g., in the requirement that the accused must believe (subjective) that he cannot otherwise preserve himself from death or grievous bodily harm, and this belief must be reasonable (objective). These two approaches could be retained with a list of factors to assist the decision-maker. The proposed questions are as follows:

(1) Were there realistic alternative means which the accused could have used to protect herself or other persons?

(2) (if relevant) With respect to (1), had the accused attempted alternatives in the past?

(3) Was she afraid of retaliation if she attempted any alternative?

(4) What was the accused's economic and psychological state?[92]

(5) How did the accused and the person she killed or assaulted compare in size and strength?

(6) Was the accused's action reasonable, given her socialization?

The purpose of this list is to require the court to assess the context, including the history of violence and the availability of help. It may be that it is extremely difficult for a male judge to decide what is reasonable fear for a woman, but the substantive law can indicate what evidence will be relevant and require that specific issues be addressed. This is not to argue for separate legal standards, but simply for recognition that a woman may reasonably perceive herself to be in danger when a man might not.

4.4.2 Provocation

The partial defence of provocation[93] raises a similar question to that posed by self-defence in the context of on-going relationships. The issue is whether it is justifiable to focus on the killing itself, in a very narrow sense, or whether the inquiry as to culpability should be broadened to encompass the past history of the relationship. More specifically, should the law recognize a defence of 'last-straw' or 'slow fuse' provocation, where the precipitating event was relatively minor but when examined in context becomes much more significant? Thus, e.g., the 'provocation' might be one slap on the face, or even only be anticipated where a husband regularly beat his wife when he came home drunk and his wife killed him when he came home in that condition.[94]

The argument that the court should examine the whole setting is not without authority in the Commonwealth and the U.S.[95] A powerful argument could be based on the House of Lords decision in D.P.P. v. Camplin,[96] where it was unanimously held that the age of the accused should be taken into account in applying the objective test of whether the ordinary person would have lost his or her self-control. The jury should in future be directed to apply a test of the 'self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; ...'[97] This leaves the door open to the possibility that the history of the event could be taken into account as throwing light on the gravity of the provocation.

Camplin may not, however, be followed in Canada. A major barrier is the decision of the Supreme Court of Canada in R. v. Wright,[98] which rejects the relevance of background. Nevertheless, the Ontario Court of Appeal has attempted to reconcile these two cases by confining Wright to peculiar characteristics. Thus in R. v. Hill[99] the Court indicated that the judge should have charged the jury in terms of the ordinary person of the age and sex of the accused.

While a step forward, this may well not be enough to allow in evidence of the background of the event which would change its nature for the ordinary person. Section 215 should therefore be redrafted to make clear that all factors which relate to the gravity of the provocation from the accused's perspective should be taken into account in applying the objective test. This aspect of the test, contrary to the opinion expressed in Wright, would still retain some content. The jury would still have to apply a test of reasonableness in the circumstances so that the accused's conduct would be measured against the jury's perception of a normal amount of self-control.[100]

This brings us to a second concern about provocation, one that is essentially the same as that discussed with respect to self-defence. It may be difficult for any decision-maker who is male, or who has internalized a male perspective on the world, to see the issue from a female perspective. This difficulty becomes acute when an objective test is to be applied although it is there with a subjective test also. Jurors may simply not believe the accused if what she says is seriously at odds with the way they see the world. In other words, there is a possibility of bias in perception of what is reasonable or ordinary.

There is clearly a considerable political element in the determination of these factors, and extensive research would be necessary in order to bring to light the political judgments that are being made. This might be extraordinarily difficult given the relatively small number of murder cases to study and the fact that many relevant decisions might be hidden in the decision to accept a plea of guilty to manslaughter.

Neither could the problem be resolved by including factors to be brought to the attention of the jury, as in self-defence. The fact that it is justifiable to defend oneself probably enjoys a considerable degree of support. It would be very difficult to find consensus on what justifies loss of self-control. Thus it appears to be an excellent issue for a jury to determine, and there may not be a solution until there is general understanding of what words and actions are provocative from a woman's perspective.

Further specific proposals are therefore impossible at this stage, in the absence of research relating to the application of 'objective' tests generally to women and men, and to what causes women to lose their self-control.

4.4.3 Necessity

Necessity is a common law defence which has been of most political significance as a defence in the context of abortion,[101] although self-defence can legitimately be considered as a developed form of the more nebulous defence of necessity. As a defence, necessity is not particularly suitable as a mechanism for mitigating the rigours of positive law. This is so because it becomes apparent so quickly that basic political, or value, choices are being made. Examples of the kinds of cases in which women might want to use this defence include theft (including shoplifting) of food or drugs for children, squatting in empty houses in the case of homelessness and the need to engage in welfare fraud in order to feed and clothe children adequately.

While the feminist literature has not addressed this issue as yet, it can be extrapolated from the analysis of other areas that the human need for shelter, food and clothing is more important than property interests *per se*. The analogy to self-defence is clear, while s.15 of the *Charter* provides a constitutional argument that everyone is not enjoying the equal benefit of the law if some can own property while others are homeless or do not have enough to eat. The existence of the *Charter* alone justifies the judiciary in making such normative choices.

It is therefore vital that the defence of necessity is clarified and legislated so that there is explicit recognition of this hierarchy of values.

While the Law Reform Commission of Canada has suggested a statutory defence of necessity,[102] it is not broad enough as it is confined to 'immediate harm'. The proposal should be redrafted to ensure that anyone who interferes with the property rights of others in order to feed, clothe or house themselves or their children, where no realistic alternatives are available, should be covered by the defence.[103]

4.4.4 Duress

The Canadian law of duress is a complex combination of a statutory[104] and a common law[105] defence. The statutory version excludes certain serious offences from its scope, and limits the defence in certain significant ways. Thus, *e.g.* the threatening person must be present and the threats be of death or grievous bodily harm. There is the potential for the common law defence to be more flexible, but its scope is not at all clear. Does duress need to be clarified and broadened to encompass the kinds of pressures to which women may be subjected?[106] There is no feminist analysis as yet, but it is possible to examine the present defence of duress and identify possible problems for women:

(1) It should be made clear that the threats can be directed against a third person, such as a child of the accused;[107]

(2) The requirement of the presence of the threatening person should be removed and replaced with a functional formulation relating to power to carry out the threats;

(3) Express reference should be made to whether the accused had any realistic source of protection, and the requirement of immediacy removed where this is not available;

(4) Fear of harm should be included where the accused has reasonable cause to believe that an order contains an implied threat;[108] and

(5) A more flexible formula with respect to the threats should be considered which allows a balancing of what is threatened against the offence committed. Thus an offence might be relatively minor in response to a threat to burn down the accused's house.

In summary, the defence of duress should be more flexible in response to the concern that women who are subjected to considerable physical violence at the hands of their partners may have no effective source of help and protection. While research would be desirable on the pressures that women experience, especially where they commit crimes with their partners,[109] these changes would provide more flexibility and realism in the law.

Lastly, one remaining vestige of a gender-specific coercion 'defence' can be found in s.150(3) of the *Code*,[110] dealing with incest. The idea that children, of either sex, could even be charged with incest is inappropriate, and this should be removed.[111]

4.4.5 Medical Explanations

Although it smacks of biological determinism, some attention has been paid to the question of whether there may be a medical explanation, such as pre-menstrual syndrome (PMS) or menopause, for some female criminal behaviour.[112]

This area should be distinguished from other defences - such as self-defence, provocation and duress - which focus on understandable responses to external stimulae. It bears a resemblance to infanticide in that we enter the realm of explanations or justifications which are internal to the accused. The criminal law has traditionally recognized only a minimal exception to the general notion that we are to be responsible for controlling our own behaviour, in the form of the defence of insanity.

Dispositional issues also arise. If certain women do commit anti-social acts as a result of a hormone deficiency, then it may not be in the public interest simply to acquit them of criminal charges. The State may have a legitimate interest in exercising some degree of control.

The possible defence of premenstrual syndrome is discussed by Judith DiGennaro in her article Sex-Specific Characteristics as Defences to Criminal Behaviour,[113] who candidly admits the potential negative connotations in emphasizing biological differences between the sexes. She describes PMS as a hormone deficiency disease, with symptoms including irritability, pain, loss of concentration, anxiety, depression and suicidal tendencies.

While some use has been made of this defence in Europe and the U.S., there does not appear to have been any trace of it in Canada. Evidence of this medical condition might be relevant to an insanity defence, although s.16 of the Code utilizes a test of cognition rather than capacity to control one's behaviour. Evidence could also be used to support an argument that the accused lacked any requisite intent. It would seem most appropriate, however, as an aspect of a diminished capacity defence, a defence which does not presently exist in Canada as such, although evidence of lack of specific intent can sometimes result in a conviction for a lesser included crime of general intent.

We are at an early stage in the development of medical knowledge about the nature of such conditions and the causative link, if any, between them and criminal behaviour. Recommendations are therefore not possible at this stage, but it is suggested that research into this area is desirable.

4.5 Recommendations

1. The requirement of an imminent assault in s.37 of the Code should be removed.

2. In considering self-defence, whether a subjective or objective/subjective test is used, the court should be required to consider certain factors:

    a) Were there realistic alternative means which the accused could have used to protect herself or other persons?

    b) (if relevant) With respect to a) had the accused attempted alternatives in the past?

    c) Was she afraid of retaliation if she attempted any alternative?

    d) What was the accused's economic and psychological state?

    e) How did the accused and the person she killed or assaulted compare in size and strength? and

    f) Was the accused's action reasonable, given her socialization?

3. The defence of provocation should state that all factors which relate to the gravity of the provocation from the accused's perspective should be considered.

4. Furthermore, research is necessary on the application of 'objective' tests and what causes women to lose self-control.

5. There should be a statutory defence of necessity ensuring a right to interfere with the property rights of others in order to feed, clothe and shelter oneself and one's children.

6. Duress should be broadened in the following ways:

    a) It should be made clear that the threats can be directed against a third person, such as a child of the accused;

    b) The requirement of the presence of the threatening person should be removed and replaced with a functional formulation relating to power to carry out the threats;

    c) Express reference should be made to whether the accused had any realistic source of protection, and the requirement of immediacy removed where this is not available;

    d) Fear of harm should be included where the accused has reasonable cause to believe that an order contains an implied threat; and

    e) A more flexible formula with respect to the threats should be considered which allows a balancing of what is threatened against the offence committed.

7. Research is necessary on pressures that women experience, especially where they commit crimes with their partners.

8. Section 150 should be amended so that it is not possible to charge children with incest.

9. Research is necessary with respect to female criminal behaviour based on medical explanations.

CHAPTER 5

OFFENCES AGAINST WOMEN

5.1 Introduction

Obviously women can be the victims of all criminal offences, but one common distinguishing thread runs through those discussed here, i.e. they are offences against women as women, rather than against people who simply happen to be women. They reveal in the deepest sense just what women are, are for, in our society. Thus the commission of all these offences plays a major role in the subordination of women; they are in the forefront of the means of oppression.

Thus these offences are about the humiliation and degradation of women, the expression of hatred against them, and their use for sexual purposes either through economic or coercive means. They are also about the sexual exploitation and objectification of women, and symbolize the fact that a major aspect of being a woman is belonging to the sex to whom these things can happen. Whether on the mind or the spirit or the body, these offences fall into a general class of gender assault.[1]

5.2 An Examination of Substantive Offences

5.2.1 Pornography and Hate Propaganda

Offences perceived as interfering with freedom of expression pose particularly acute problems when one attempts to analyze them from a feminist perspective. Aside from a common concern about the interests of women in our society, there is not a feminist consensus on a hierarchy of values. Some writers have put a high value on freedom of expression,[2] and expressed concern about potential censorship of feminist expression.[3] Not all feminists agree that the freedom to express oneself extends to pornography[4] and some urge State intervention.[5] Others are undecided.[6]

The three major issues to be addressed in the context of criminal law reform are these:

(1) Is pornography harmful?
(2) If so, what is it that is harmful? and
(3) To what extent, if at all, should the criminal law be utilized to minimize this harm?

The feminist consensus tends to decrease with each question.[7]

Is pornography harmful? The debate on this seems to relate to two issues. First, does the consumption of pornography translate into other forms of action, such as sexual assault and aggression toward women? Secondly, there is disagreement about the nature of harm itself and whether there are less obvious types of harm, such as maintenance of the subordinate status of women, the equation of sex with domination and the damage to relationships between the sexes.

There is considerable evidence that pornography increases male aggression toward women and tolerance of their pain. The literature is set out by Gershel in *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered*[8] and by MacKinnon in *Not a Moral Issue*.[9] Gershel identifies three harms: abuse of women by men who have 'learned from pornography', the injury suffered by those involved in its production, and the alteration of male attitudes to women generally.[10] MacKinnon analyzes the harm more broadly as the practice of male supremacy. It seems that at some fundamental level, however, the perception of pornography as harmful comes from one's own experience and political orientation.

Pornography is harmful in a number of ways. It most directly harms the people who appear in it. It negatively affects the way men behave towards women in that it helps to maintain the subordinate status of women. As forcefully argued in the Fraser Report, 'the most hateful forms of pornography are subversive of policies and values favouring equality'.[11] A fundamental premise of that Report is that the legitimate ambit of the criminal law extends beyond demonstrable, tangible harm to certain social values and policies, such as equality.[12] Pornography is also harmful in the offensiveness of the reminder of women's subordination.

What is it that is harmful? There are a number of approaches to this, albeit with considerable consensus that pornography is not the same thing as obscenity. The following are sample feminist definitions:

> What defines it as pornographic ... is that it depicts, condones and encourages act of domination, degradation and violence towards women.[13]
>
> Pornography is verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants in such a way as to endorse the degradation.[14]
>
> Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience

> sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts - including but not limited to vaginas, breasts, and buttocks - are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.' The ordinance also defines 'the use of men, children or transexuals in the place of women' as pornography.[15]

The following is the definition adopted by the Canadian Advisory Council on the Status of Women:

> Pornography is a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such behaviour can be taken to be advocated or endorsed.[16]

As for the Fraser Committee, it adopted a three-tier definition of pornography: material involving children or actual physical harm to a person depicted, sexually violent and degrading material and sexually explicit material.[17] None of the above definitions is limited to violent pornography. Conversely, they are not broad enough to cover all sexist words and images which can be harmful and degrading to women.[18]

This raises the third issue. To what extent, if at all, is it appropriate to use the criminal sanction? There are a number of arguments against criminal intervention.

Since decisions will still be in the hands of men, there is no guarantee that the criminal law will not be used against feminist forms of expression. It would be impossible, in any event, to draft provisions with enough precision to satisfy people who do not share the underlying values that they are constitutional.

Other arguments include:

(1) The criminal law would perform an important function in maintaining pornography as forbidden, thus increasing its attractiveness.

(2) This particular form of the oppression of women would just become less public and women would be less aware of it as a source of harm.

(3) Alternatively, the law would simply not be enforced and so would be useless anyway, or it would be enforced selectively.

(4) It would interfere with freedom of speech which is a more important right than the right not to be oppressed in this way.

There are arguments in favour of use of the criminal law. The criminal law performs an important function in labeling deviance and it is important that the community use this method of rejecting the legitimacy of pornography. Although there will be enforcement problems, it will give women some new power in that they can initiate prosecutions and lobby for use of the criminal sanction in particular instances. As a process, the criminal law is better than prior restraint in that it operates in public, and is more visible, with previously-established standards, while prior restraint interferes more with fundamental freedoms. It also puts the responsibility where it belongs, on those who traffic in pornography and make a profit from it. Provisions can be carefully drafted to minimize the danger of use against feminist material.

There are clearly weighty feminist arguments on both sides of this issue, but in our view obscenity offences should be redefined to criminalize pornography in the feminist sense. Without suggesting that pornography is the most significant harm to women and that it is the cause of the subordination of women, it is a very powerful symbol of women's status. The State could provide impetus to the efforts to educate people about the harmfulness of pornography, and women could be empowered by being able to initiate, and lobby for, prosecutions.

Provisions should therefore be drafted creating offences prohibiting the production, possession and trafficking in pornography, based on the subordination of women (as in the MacKinnon definition); but at the very least covering violent pornography.[19] The Fraser Committee recommendations certainly deserve serious consideration as a possible model. What is proposed is a series of offences ranging from the most serious of pornography causing physical harm, through offences relating to sexually violent and degrading pornography, to the summary offence of the display of visual pornographic material.[20] The hierarchy of harms is apparent.

The most significance is attached to physical safety, while it is recognized that there is a harm attached to being obliged to view pornography in a public place. This is a very important initiative toward law reform in this area, and one considerably influenced by feminist concerns. The proposals are consistent with a trend that is already apparent in the criminal law,[21] and in our view the criminal law reform should support and encourage both this initiative and this trend.

The issue is much clearer with respect to child pornography. The harm is much more obvious here since all children involved in the production can more obviously be seen to be victims of sexual abuse. The provisions drafted should therefore contain offences relating to the production, trafficking in and possession of all sexually-explicit material involving children. The reasons for prohibition and draft provisions are set out in the Badgley Report (children),[22] and those are recommended for adoption here.

An alternative method of approaching the problem of pornography is to treat it as a species of hate propaganda. It is important to make the analogy, as the incitement to hatred provisions represent an important acknowledgement that the interest in social and racial tolerance is an interest worth protecting by the criminal law. The concept of group defamation can be of some use with respect to the understanding of the harm that pornography does.

It is important to remember, however, that the analogy is not a complete one. Our present incitement to hatred provisions,[23] which exclude sex as an identifiable group, relate to forms of material which are relatively easily perceived to be promoting hatred. The women-hating message in pornography is not so visible, and may indeed seem to be the opposite in a society already deeply influenced by it. Our decision-making structure may not therefore have the capacity to recognize the promotion of hatred against women.[24]

Consequently, the problem of pornography must be tackled by the explicit prohibition of certain images and writing, rather than under the umbrella concept of the promotion of hatred.

It might be argued, however, that sex ought to be added to the categories in s.281.1 of the Code in any event, to deal with propaganda which would be recognized even by non-feminists. This may be to define the social problem out of existence, as the forms of misogyny are so pervasive and embedded that explicit propaganda against women in unnecessary, and there is no evidence of consensus on the feminist view that pornography is hate propaganda. Unless there is a realistic possibility that prosecutions could be effectively brought, the inclusion of sex would be an empty gesture, giving the illusion of progress. Most importantly, if sex were included in a gender-neutral way, then feminists could be charged with incitement of hatred against men, since concerns about patriarchy are stated explicitly and are often perceived as 'men-hating'. The hatred of women is invisible and the attempt to speak out against that hatred is construed as hatred.

5.2.2 Prostitution-Related Offences

From a feminist perspective there are a number of problems in this area:

(1) the fact that men are buying women and children's bodies for sexual purposes;

(2) discriminatory law and discriminatory enforcement of the law;

(3) the contribution that prostitution makes to the objectification of women and the commoditization of sex;

(4) the distress caused by knowledge that women and children are being used for this purpose;

(5) the public nuisance aspects of which women as a whole are victims; and

(6) the harassment of individual women by men seeking to buy sexual services.

There seems to be a feminist consensus that prostitutes are exploited and should not be victimized by the law, but beyond that there is some divergence of opinion.[25] The National Association of Women and the Law has proposed the removal of soliciting (s.195.1 of the Code) and the use of other offences (such as causing a disturbance in s.171) and municipal by-laws.[26] The Canadian Advisory Council on the Status of Women has proposed an offence covering all pressing and persistent soliciting of any kind.[27]

It may be useful to work from the areas on which there is consensus through to the more contentious areas.

First, any law must be non-discriminatory on its face and in its application.[28] Given the view that women are victimized by prostitution, this does not mean that gender-neutral laws rigidly enforced against males and females alike would be justifiable. This point is crucial, however, when it comes to the use of offences such as causing a disturbance and municipal by-laws. If these were predominately used against women prostitutes, and did not address genuine public nuisance problems irrespective of gender, then they would be subject to attack under s.15 of the Charter. In other words, it is not argued here that prostitutes should not be susceptible to criminal prosecution for shouting or swearing in the street, or engaging in indecent acts in public; but rather that they should be only if men and non-prostitutes generally are likewise susceptible.

Secondly, there are offences available to deal with public nuisance: ss.169 (indecent acts), 170 (public nudity), 171 (causing a disturbance)[29] and 245 (assault). To the extent that such offences are not used, or are not used successfully, this really weakens the argument that complaints are directed at public nuisance and not prostitution per se.

Thirdly there seems to be considerable consensus about child prostitution. The Badgley Report (children) documents the 'tragic consequences of a life of prostitution for young persons'.[30] The Committee makes a number of recommendations with respect to the criminal law:

(1) a strengthening and broadening of s.195 relating to pimps;[31]

(2) an offence of buying or offering to buy sexual services from a person under 18;[32] and

(3) an expanded offence of soliciting.[33]

From a feminist perspective, recommendations (1) and (2) should be strongly supported, while (3) should be rejected, as an exercise in victim-blaming. Research conducted for the Committee establishes that unwilling people are rarely approached by juvenile prostitutes.[34] There does not therefore appear to be a social problem here which ought to be addressed by the criminal law. The reason given by the Committee, that this was the only effective way to help these children, does not justify the use of the criminal sanction. The outrage at this problem and the feeling of helplessness are very clear. Children should not be punished, however, for engaging in prostitution; a better focus is on improved social services and employment opportunities.

Fourthly, there is the issue respecting the criminal law against pimps. While the Badgley Committee was not examining the area of adult prostitution, there seems no reason to suppose that the picture of exploitation and violence would vary where the prostitute is an adult rather than a child. It is therefore proposed that some protection for prostitutes in s.195 is justified. The problems in this area are largely to do with enforcement.[35]

The proposals of the Badgley Committee, that s.195(2) be amended to refer to a prostitute in the singular and that sub-ss.(3) (corroboration) and (4) (limitation period) be removed, would be appropriate whatever the age of the victim. If a prostitute goes to the police for assistance in escaping an exploitative relationship (unlikely as this might be) it is vital that she have an offence on which to act. Attention should be paid, however, to the wording of s.195(i)(j) (living off the avails of prostitution) so that it is more clearly directed at pimps and is not broad enough to cover the dependents of prostitutes.

The Fraser Committee recommendations, which focus on the violence of the pimp/prostitute relationship, could provide one answer to this problem. The Report states that the offences of procuring and living off the avails should be characterized by force or the threat of force:[36] '(W)e see no justification in affording the protection of the criminal law to adults who form relationships, which, while not considered in their best interests by others, nevertheless represent an apparently genuine choice on their part'.[37] While it is questionable whether genuine choice exists, it may be impossible for the criminal law to respond to forms of non-violent coercion.

This leaves the more contentious issue of whether there should be any offence of soliciting. It has already been proposed that prostitutes themselves should not be vulnerable to prosecution for soliciting. If that approach is taken to its logical conclusion, however, solicitation by a customer would be seen as an attempt to victimize the person solicited in this way, and the actual purchase of sexual services would be seen as analogous to a sexual assault.

It is arguable therefore that there should be customer-oriented offences of offering to buy or buying the sexual services of another. In other words, the Badgley recommendation with respect to consumers of child prostitution should be expanded to cover all prostitutes.[38]

There are various concrete ways in which prostitutes could be harmed. Thus one could examine their states of mind, rate of suicide, drug use, loss of self-esteem, vulnerability to violence by customers and pimps and exposure to venereal disease.[39] It would be useful to have a national Canadian study of the effects of prostitution on the prostitutes, along the lines of the Badgley Report, but the crucial harm suffered is a matter of perception. The prostitute suffers harm if one perceives the selling of one's sexuality as the epitome of the devaluation and objectification of women, sexual slavery.[40] Prostitution has been called 'an extreme case of sex stratification',[41] since the prostitute is nearly always controlled by male pimps, police and clients. It has been analyzed as representing the core of our entire gender hierarchy in that it involves ownership or exchange of sexuality.[42] This is important to feminists, who do not wish to isolate women who work in this way and who recognize that prostitutes are only on one part of a continuum of the exchange of sexuality for other things.

There are serious arguments against using the criminal process. Customer-oriented offences would be very difficult to enforce, and since prostitution is a 'complainantless' crime it requires detection methods akin to entrapment. In any event, since it will mostly be males who will enforce the law, there may not be the necessary energy and commitment. It is still an interference with the prostitute's livelihood, even if she is not directly penalized. The use of the criminal process would not be supported by prostitutes themselves, who need customers to make a living. It smacks of involvement by the State in the private sexual lives of individuals.

A tentative proposal is that the criminal law should play a role in the elimination of the male demand for prostitution. As with pornography, this may be of use in 'delegitimizing' the activity. It is therefore recommended that the offence proposed by the Badgley Committee with respect to young persons should be expanded to include offering to buy or buying sexual services from anyone. Such offences should, however, only be introduced in the context of a national campaign against prostitution. Such a campaign should include serious attempts to change the economic inequalities women suffer (e.g., equal pay for work of equal value and job training programs for women) and a publicity campaign pointing out the harm in the objectification of women and children.

5.2.3 Assault

The issue of wife abuse is one that has been receiving a great deal of attention recently and seems to be increasingly well-understood.[43] The problems seem concentrated on the level of enforcement of the law and recognition of what are the most appropriate and effective actions.[44]

5.2.4 Sexual Assault

The law relating to sexual assault has recently been the subject of a major overhaul.[45] While there was considerable feminist support for these changes,[46] there was by no means consensus,[47] and it would be wrong to suppose that there is general satisfaction with the changes.

There may, however, be some willingness to wait and see what the effects of this latest reform are, before recommending any further major changes. In that context, it is vital that there be ongoing research by feminist criminologists to monitor the effects of the reform, and that legal scholars keep a close watch on the judicial interpretation of the new law. The structure of the provisions reveals two basic objectives, which should be used as criteria in order to test the success of the reform:

(1) The minimization of victimization of the complainant by the legal system itself, e.g. are complainants being questioned about irrelevant physical details and sexual history and is their privacy being respected? and

(2) The improvement of reporting, prosecution and conviction rates for sexual assault.

The following discussion therefore is premised upon the assumption that the present structure of sexual assault offences will remain until serious deficiencies are revealed. Thus the proposals relate to the fine-tuning of the existing provisions. There are a number of areas which may cause concern from a feminist perspective:

(1) the meaning of the term 'sexual';
(2) the mistake of fact defence, and the nature of consent generally;
(3) the significance of violence;
(4) the scope of the concept of 'exercise of authority'; and
(5) implied consent.

The meaning of the term 'sexual' has already given judges difficulty. This illustrates the irony in the structure of the new offences. Reform was supposed to shift attention from the sexuality to the violence of sexual attacks, and yet predictably, considerable attention focuses on what makes an assault 'sexual'.

The New Brunswick Court of Appeal has decided that breasts are not 'sexual'.[48] It was felt that secondary sexual characteristics had to be excluded, otherwise touching a man's beard would have to be classified as sexual. This approach has been consistently rejected by other courts including the Ontario and Alberta Courts of Appeal. In R. v. Alderton[49] the Court, while declining to follow Chase, did not attempt any comprehensive definition. What was felt to be included, however, was assault with an intent to have sexual intercourse without consent and assault for the purpose of sexual gratification. In R. v. Taylor,[50] other possibilities were added: a sexual assault was an act of force in circumstances of sexuality and included an act intended to degrade and demean for sexual gratification. The test was an objective one: was the sexual or carnal context visible to the reasonable observer? In applying this test, the victim's perception and the purpose of the accused might or might not be of assistance.[51] Mr. Justice McDonald, of the Alberta Queen's Bench, has held that a sexual assault is an assault with a sexual motivation.[52] Another court has used a 'aura of sexuality' test.[53]

A number of things are clear. First, it will be very difficult to produce a test which encompasses all the different types of assault which could justifiably be called sexual. Secondly, whatever test is adopted, it will inevitably be circular and will have to be based ultimately on the judges' understanding of the cultural, political, economic and social meanings of sexuality in our society. The 'sexual motivation' and 'aura of sexuality' tests in particular are simply question-begging.

If indeed we have to trust judicial intuition and experience, then it becomes imperative that judges do a number of things. They should consciously attempt to embody women's perspectives[54] in their analysis,[55] so that the meaning of 'sexual' is not exclusively male. They should incorporate research from other disciplines on the male and female experience of sexuality. It is therefore recommended that a study be conducted that collates all such research and makes this available to the public, so that judges and lawyers can utilize it. Lastly, judges should not assume that because the definition of sexual assault is gender-neutral that our understanding of what is sexual must be gender-neutral also. Breasts and beards are secondary sexual characteristics but they have very different social, economic, psychological and cultural meanings in our society.

The mistake of fact, or mistaken belief in consent defence, is one of the most contentious aspects of the new law. It was strongly urged by some feminists that a man accused of sexual assault should not be acquitted because he mistakenly believed that the woman was consenting, while other feminists believe that such a defence is justifiable if a requirement of reasonableness is added.[56] The present s.244(4) seems, however, to give legislative form to the Pappajohn[57] approach. Thus reasonable grounds are probably of evidentiary significance only.[58]

Discussion of this issue so far has tended to take two forms. One form is abstract discussion on a very theoretical level of a subjective versus an objective test of culpability.[59] Alternatively, there are political assertions about what the rule ought to be, or a mixture of both. The outstanding exception is the work of Prof. Pickard, who suggests a principled yet contextual approach to the issue of mens rea with respect to individual crimes.[60]

But the issue cannot be resolved at the level of theoretical reasoning about the purity of our conceptual structure. At bottom it is a political question about what we as a society consider culpable. The issue here is whether it should be criminally culpable for someone to touch another sexually without securing consent, or at least without taking reasonable steps to ensure that consent is present.

The main concern of the subjectivists is that people should not be judged by standards beyond their capabilities. This concern can be met, however, by an individualized approach to culpability. The two-stage test of Prof. Hart can be adapted for use in this context:[61]

(1) Did the accused take those precautions which any reasonable person would have taken in the circumstances to ensure that the complainant was consenting to the sexual contact?, and

(2) Was the accused, given his mental capacities, capable of taking those precautions?

There are obvious criticisms of both of these. First, (1) might not establish a standard if the very problem is that 'reasonable' men in our society take minimal or no precautions to satisfy themselves of the existence of consent. If the test is informed by that reality, then it is hardly a standard at all.[62] Thus the test should be redrafted to make clear that it is one of a reasonable person who accepts the individual's right to sexual autonomy.

The suggestion that some people might be incapable of assessing consent and should not be judged by a reasonableness standard would probably be rejected by many feminists. After all, it might be argued that ascertainment of consent is not a complex matter, and such a provision might in practice provide a defence for those who were politically rather than intellectually incapable of seeing the situation from another person's perspective. While it would be entirely unacceptable to acquit someone because he has been conditioned to think that women mean 'yes' when they say 'no', there may be a very rare individual who is literally incapable of seeing things from another perspective. Since this incapacity seems reasonably analogous to insanity and such a person would obviously be very dangerous, provision would have to be made for his confinement and education so that the public is adequately protected.

A defence should therefore be considered along the following lines:

(1) the accused could argue that he took those precautions which any reasonable person, with due deference to the rights of other individuals to sexual autonomy, would have taken in the circumstances to ensure consent to sexual contact;

(2) if he failed to take those precautions, it was because he was mentally incapable of taking such precautions;

(3) this defence should be treated as a form of any reformed defence of mental incapacity in that the accused was incapable of knowing that the sexual contact in those circumstances was wrong.

Such an approach would achieve a number of results. It would make clear that the onus is on the individual to take reasonable steps to ensure consent. This is a very light onus, as reasonable steps are easy to take and the accused has his mind on the transaction in question.[63] It might be argued, however, that there are people who are incapable of taking reasonable steps and an objective test would result in unfair punishment for them. Since these people would obviously present a very grave danger to others, they should be dealt with by analogy to those who are acquitted on the ground of insanity. Obviously, such a group would be very tiny, and perhaps even non-existent. Furthermore, the defence pays considerable deference to whatever traditions we have of individualized conditions of responsibility, while recognizing the substantial danger in acquitting someone incapable of meeting the standard proposed.

With respect to the significance of violence, the structure of our present offences does not embody the theory of sexual assaults as violent in nature. The tiers of offences are based on escalating degrees of violence other than the sexual attack itself. Thus a rape, e.g., committed against a victim who submits out of fear of the demeanour and size of her attacker, would only be classified as the bottom-rung sexual assault, in s.246.2. Again, it may be too early to propose changes in this structure, but on-going research should pay attention to whether this reform has resulted in the relative trivialization of sexual aggression per se.

It is similarly unclear as to whether the concept of 'exercise of authority' in s.244(3)(d) is working satisfactorily. This provision stipulates that for the purpose of assault, there is no consent where the complainant submits or does not resist because of the exercise of authority. On paper this looks like a major improvement in the law, which should provide some protection against some kinds of sexual harassment.[64] There is, however, little authority on the meaning of this concept,[65] and it may be construed to cover only the most blatant cases of exploitation of power.

A further area of research should focus on the development of a concept of implied consent. This is not mentioned in the Code at all, but case law may make reference to it necessary. This is particularly problematic in cases involving very brief and minor sexual touchings, without any complex interaction leading up to them. It will be important with respect to whatever doctrine does develop that it puts a high enough value on the right to be free from unwanted sexual touching, especially in the work place.[66]

In summary, what is suggested here is ongoing monitoring of the potentially sensitive concepts together with the introduction of a modified objective test with respect to the mistaken belief in consent defence.

5.2.5 Sexual Offences Against Vulnerable People

There are a number of offences aimed at the protection of specially vulnerable people: the 'statutory rape' offences;[67] incest;[68] seduction of females between 16 and 18;[69] seduction under promise of marriage;[70] sexual intercourse with a step-daughter or employee;[71] seduction of female passengers;[72] parent or guardian procuring defilement;[73] householder permitting defilement;[74] corrupting children.[75]

Some of these provisions are widely regarded as anachronisms and the whole area as being generally in need of reform. A number of very basic principles can, however, be abstracted from this collection of offences. First, it has obviously been felt that girls and young women are specially vulnerable and in need of protection.[76] Secondly, there has been a recognition of vulnerability in specific kinds of status and situations. Thirdly, there has been recognition that some people are well-placed to exploit that vulnerability.

It is clear therefore that Parliament has felt that there is a special coercive potential in certain situations and in certain relationships. While the present offences may no longer be appropriate (they were, after all, particular legislative responses to perceived social problems at particular times) the principles they embody can still be utilized to address our present problems.[77]

If this approach is adopted, then it will be necessary to think of which groups are specially vulnerable, in what situations, and with respect to which persons. The old list should be replaced with a new one, rather than a few abstract offences. The criminal law might be more effective if, e.g., it contains an unequivocal message that parents cannot have sexual contact with children, rather than more conceptual propositions which people may not comprehend as applying to them.

There are two major areas where evidence has accumulated of special vulnerability that is being exploited on a massive scale. First, the Badgley Report (children) has documented the problem of sexual abuse of children in families. Secondly, the problem of sexual exploitation by employers and co-workers is becoming better understood.[78] This latter situation may be covered by the 'exercise of authority' aspect of sexual assault, but at the moment there seems to be no particular reason to repeal s.153(1)(b) (sexual intercourse with employee). In this section, attention is focused on children. Canadian feminists have supported the prosecution of those who abuse children sexually.[79]

The Badgley Report (children) included a number of recommendations.[80] As they will probably provide the focus for any impetus to reform, they are commented upon here.

Gender-specific offences should be retained for intercourse with females under 14 and 16. The constitutional justification is that female children suffer a unique harm specific to their sex from the insertion of a penis in the vagina.[81] This has the advantage of clear identification of the vulnerable group and the clear placement of responsibility to avoid exploitation of that vulnerability. It also avoids the problems of a gender-neutral version. As long as male children are protected by other provisions, and children protected from sexual abuse by women (even if this is very rare), then it is justifiable to retain a clear provision making it an offence for males to have sexual intercourse with young girls.

The Badgley Report (children) would replace s.153(1)(b) with an abuse of a position of trust offence. It would, however, be preferable to list the positions of trust envisaged, either as a separate offence or as exacerbating factors in other offences. Such factors could include: a significant difference in age, the fact that the accused was the victim's parent, (or in loco parentis), employer, teacher, or in any other position of authority.

The Badgley Report (children) contemplates that if two 15 year olds had sexual intercourse, the male would be liable to conviction. While the female could be said to suffer the same risks of pregnancy and venereal disease, she does not appear to be undergoing those risks in the same coercive way. It is therefore suggested that two levels of offence be introduced for any form of sexual contact offence. There should be an offence of sexual contact with a child under a certain age (e.g. 14), with certain aggravating factors going to sentence. Further it should be an offence to have sexual contact with a young person between 14 and 18, but only where one of the aggravating factors was present.

The strongest possible support should be given to the recommendations to remove any victim-blaming provisions. The Report recommends the repeal of ss.146(2)(b) (female of previously chaste character), 146(3) (female not more to blame) and 150(3) (incest where female convicted). No equivalent provisions should be introduced.[82] It is vital that any provisions directly address those with the potential to exploit vulnerable people and clearly indicate their responsibility. The present law removes protection from a 15 year old who has already been victimized by being exposed to sexual activity at an early age.

There does not appear to be any justification for a special limitation period for any of these offences, as presently exists in s.141. As the Badgley Committee (children) has recommended, therefore, such limitation periods should be removed.

The Report recommends the addition of new offences of sexual touching, invitations and exposure. These would remedy the limitations of the gender-specific offences and expand the protection presently offered. There seems no reason to protect children from sexual intercourse only, as long as it is clarified that the law does not apply to young people engaging in sexual experimentation themselves.

Furthermore, family relationships must, to a certain extent, be in a class by themselves, since they have a special coercive potential beyond age. A child who has been sexually abused may not be in a psychological or economic position to decline consent once the requisite age is reached. Therefore, as contemplated by the Badgley Report (children), there should be a special crime of incest, without age limits, that covers all family relationships, unlimited by legitimacy or biology.[83]

One feminist commentator, Diana Majury, has suggested that the crime be retained for its symbolic value in that it contains an explicit statement that incest is so seriously wrong as to be a crime. The law, however, should be changed to focus on any form of sexual activity in the coercive context of a relationship between a dependent and a person with parental authority.[84]

One issue not addressed by the Badgley Report is that of the marital immunity in s.146 (sexual intercourse with female under 14). If it is determined that children should be protected from sexual activity up to a certain age, then there seems no reason to have an exception where a marriage has taken place. It is proposed that this marital immunity be abolished.

The Report does recommend repeal of the various seduction offences. While it is not a conclusive argument that offences are not used, since law enforcement officials may be failing to utilize them for unacceptable reasons, there is no evidence to suggest unmet female demand for enforcement here. These offences should therefore be repealed, but only on the assumption that the 'exercise of authority' form of sexual assault should be broad enough to protect women and children from abuse by persons in positions of power.

5.3 Recommendations

1. Provisions influenced by the Fraser Report recommendations, should be introduced creating offences of production, possession of and trafficking in pornography, with a definition of pornography based on the concept of subordination, but at the very least, covering violent pornography. A number of feminist lawyers should be consulted about the drafting of such provisions.

2. The proposals of the Badgley Report on child pornography should be adopted.

3. Monitoring of the use of offences such as public nudity, indecent acts and causing a disturbance is necessary to ensure that they are not being used in a discriminatory way, or simply to harass prostitutes.

4. The recommendations of the Badgley Committee (children) with respect to child prostitution should be adopted, with the exception of the offence of soliciting.

5. Section 195(1)(j) of the Code should be redrafted to ensure that it can only be used against pimps and not the dependents of prostitutes.

6. If it becomes government policy to conduct a national campaign against prostitution, with economic and publicity initiatives, then a useful part of such a campaign would be to make it a criminal offence to offer to buy or to buy the sexual services of another.

7. Research on the effects of the sexual assault law should test the law against the following objectives:

    a) The minimization of victimization of the complainant by the legal system itself;

    b) The improvement of reporting, prosecution and conviction rates for sexual assault.

8. Inter-disciplinary research is necessary on what is perceived as sexual, focusing on the differences, if any, between male/female experiences and heterosexual/-homosexual experience. Such research could be used in the program of judicial education.[85]

9. The defence of mistaken belief in consent should be reformulated to require reasonable grounds for the belief. The accused should, however, be able to argue that he was incapable of taking reasonable steps to ensure consent and thus come within whatever defence exists of mental incapacity.

10. Ongoing monitoring is necessary on the jurisprudence relating to the treatment of sexual aggression *per se*, and the concepts of exercise of authority and implied consent.

11. Gender specific offences to protect young girls from sexual intercourse should be retained.

12. Sections 146(2)(b) (female of previously chaste character), 146(3) (female not more to blame) and 150(3) (incest where female convicted) should be removed. With respect to s.150, it should be made clear that the victims of incest cannot be charged.

13. Section 141 and other special limitation periods should be repealed.

14. The Badgley Report (children) recommendation of offences of sexual contact, limitations and exposure should be adopted, with certain exceptions. With respect to all offences of sexual intercourse and sexual contact, it should be clarified that sexual experimentation between young persons is not included, contrary to the Badgley Report. One way of achieving this would be to make sexual contact illegal between certain ages only if an aggravating factor, such as abuse of a position of trust, is present.

15. The offence of incest should be retained and expanded to cover all family relationships.

16. The marital immunity in s.146 should be removed.

17. The seduction offences should be repealed.

CHAPTER 6

FEMINIST VISIONS IN CRIMINAL LAW

6.1 Introduction

An attempt has been made in earlier chapters to examine the criminal law from various perspectives: the perspective of women victimized by other individuals, looking to the State for protection, the perspective of women as objects of control by the State and generally from the perspective of women as an oppressed group.

It is possible to examine the criminal law from another perspective: women as lawmakers. Women, of course, as members of society, have an interest in the values expressed in the criminal law, whether or not they appear as accused persons or victims.

This is an attractive perspective, since it envisages women as the holders of power, using the mechanism of the criminal law to achieve what women perceive to be good. As such, it is a utopian perspective and suffers from our lack of knowledge of whether there is a distinctively female vision of what constitutes good and bad. It suffers also because it is fundamentally impossible to have a utopian vision of the substance of the criminal law divorced from its process. Apparently no work has yet been done on the nature of a feminist criminal justice process, if such a thing is in fact conceivable.

All that is attempted in this chapter therefore is the creation of a list of issues which could be the subject of feminist research. Perhaps it is more in the nature of a suggestion to male and male-identified law reformers that their perspective on these issues might well be limited and that attempts should be made to broaden consultations to include various feminist perspectives.[1]

6.2 Preliminary List of Issues

(1) Violence against children. Should there be any defence under s.43 of the Code to assault against children?[2]

(2) Is there too much tolerance in the criminal law for the use of violence? Suggestions could include the redrafting of s.25(4) (protection of peace officer acting under authority) to discourage the use of force and the imposition of a duty to retreat in the contexts of self-defence and defence of property. A great deal of attention should be paid to the issue of violent sports. At the moment there does not appear[3] to be any limit to the defence of consent to assault. Thus it is possible for boxing to be legal, even though bodily

harm, sometimes serious and even fatal, is caused. It is possible that a feminist criminal law would make the prohibition of boxing absolute in s.81 and severely limit the defence of consent to assault.

(3) Are there sufficiently severe limitations on possession and use of firearms? Or do women need access to weapons for defence purposes?

(4) Is there sufficient protection for animals in the *Code*? For instance, should ownership of 'wild living creatures' be permitted in s.283 (theft)?

(5) Is there sufficient protection for the environment in the *Code*? Is there sufficient recognition of the seriousness of interfering with the interest of all living creatures in clean water and a clean environment generally? Is this simply a question of *our* interest in the environment, or should non-animal living parts of the planet be accorded respect in some form?

(6) Should we change our notions of property, *e.g.* by changing our law of theft to reflect a willingness to share?[4] Can we learn other values from native Canadians? How much should their perspective be embodied in reform of the criminal law? Are there yet other perspectives which should be taken into account?

(7) How should the interest in the introduction of new technologies be balanced with respect for reproduction, health and quality of life generally? Is there sufficient protection for workers? Does the criminal law have any appropriate role to play in encouraging the provision of a healthy, safe, non-discriminatory work environment?

(8) What harm does gambling cause? Empirical data are necessary on who gambles and the effect of gambling on women and children. Should the State condone this in any form through exceptions to the prohibitions against gambling.[5]

(9) Similarly, with respect to alcohol: the tolerance of alcohol use in our society may have a direct impact on security of the person for women and children. There is a history of women's involvement in this issue.

(10) Since the criminal law relates to the social control of individuals by the State, it may not be appropriate to discuss control of State action here. Should there, however, be a constitutional prohibition on the manufacture or purchase of weapons by the State? Again women have a history of involvement in the peace movement.

6.3 Conclusions and Recommendations

It is not possible to state conclusions with respect to these issues, and recommendations are premature given our present state of knowledge. The main theme, if there is one, is that the criminal law reform process should not be limited by the range of issues and choices deemed acceptable from a middle-class professional white male perspective. This is particularly important since the ultimate decision-makers, politicians, may be trapped also by the limitations of their own perspective. Solutions to that problem range far beyond the issue of criminal law reform.[6] Reformers should, however, be very aware that at no stage in the process is it necessary for decision-makers to make themselves aware of a multiplicity of perspectives, so that it is very important for the consultation process to be as diverse as possible.

PART III

PROCEDURE AND EVIDENCE

CHAPTER 7

DEFINITION AND SIGNIFICANCE OF CRIMINAL PROCEDURE

7.1 Introduction

The criminal law provides a mechanism for dispute resolution not between individuals but between individuals and society. Two a priori questions are therefore raised: (1) which actions are considered injurious to society and thus defined as criminal?; and (2) how are the disputes to be resolved? The latter question of mechanics is the topic of this part of the review dealing with procedure and evidence.

One might say that the goal in dispute resolution at this level is not to determine some metaphysical truth, but rather to arrive at a socially acceptable version of the facts. That they are socially acceptable is by virtue of their having been arrived at by way of procedural and evidentiary rules framing their determination. Both the enunciation and definition of offences by Parliament, and the procedural and evidentiary rules dealing with those offences, provide the backdrop against which the drama of the criminal law is enacted. Substantive offences and defences are mere political statements in the absence of the procedures which allow their application, i.e. both their enactment as law and their prosecution.

7.2 Analysis

As with the preceding part on substantive offences and defences, only one level of analysis discloses discrimination on the face of legislation. That is a superficial approach to a feminist review of the criminal law. If indeed the 'decontextualization' of criminal procedure and rules of evidence are antithetical to feminist method,[1] then singling out bits of procedure which are directed at one sex rather than the other serves only as a distraction.

It is particularly an unsatisfactory method in the domain of criminal procedure and evidence, where so much of the subject is based on practice and jurisprudence, rather than positive statutory enactment. Rather, one should attempt to analyze not only the glaring examples of sexism on the surface of criminal procedure, but more importantly to develop a feminist analysis of the criminal law in toto. Thus attitudinal questions which are ordinarily the sociologists' domain gain significance in this legal study. Credibility being one of the great underlying themes of criminal procedure and evidence, the matter of how a woman's statement is perceived when in conflict with a man's, or when elicited by a man in a position of power, merits attention. Similarly, the matter of how a woman responds to various manners of investigation and questioning becomes important. In sum, the perceptions of, and attitudes of, women involved in the criminal process must be accounted for in preparing a feminist analysis of the criminal law.

The Canadian Charter of Rights and Freedoms impacts upon women most directly by virtue of ss.15 and 28, the equality provisions. It is important to examine ss.1 and 7 in analyzing procedural questions, though not only in terms of the equality provisions, but also with regard to the manner in which any of the Charter guarantees can be brought to life. Finally, it would appear that s.7 has an independent life in guaranteeing security of the person. Specific areas of procedure will be examined as they impact upon women.

In setting up a framework for examination of criminal procedure, some attention will be given to the concept of jurisdiction and to the history of criminal offences specifically affecting women. The notion of jurisdiction (*i.e.* the process by which the State assumes power to define and prosecute criminal offences) combined with the history of offences which have thus been devoted to women, provides a vivid backdrop against which to discern a feminist analysis of procedure and evidence.

7.3 Conclusions

While rules of procedure must be analyzed primarily in terms of their impact, evidentiary rules disclose several instances of *prima facie* discrimination. Whether a move to a 'gender neutral' position is desirable must be considered in each instance.

7.4 Recommendations

1. Areas of concern for women in the criminal law are found in the substantive offences and defences, in the Charter of Rights, in the rules of evidence, and in the procedural domain, which governs the existence of the foregoing areas and their application. There must be some consensus on what these areas of concern are.

2. As a second level of definition, the concepts guiding feminist analysis must be agreed upon.

3. Once we know what we are looking at and what the guiding principles are, then a more profound feminist analysis of the criminal law is possible.

4. Policies to appoint more women to the bench should be developed and implemented by way of affirmative action programs.

CHAPTER 8

JURISDICTION AND WOMEN'S INTEREST IN THE CRIMINAL LAW

8.1 Introduction

The concept of jurisdiction is elusive but fundamental to criminal prosecution. Jurisdiction is the manner in which the links of the criminal law process bind individuals to participate in the process. It may well be, as the American jurist Oliver Wendell Holmes comments, that 'the foundation of jurisdiction is physical power'.[1] Clearly physical power was the original basis upon which the early British monarchy was able to enforce its laws in its courts. Today jurisdiction bestows authority upon police to effect investigation and arrest, upon the Crown to prosecute or not, upon courts to try matters brought before them and finally upon the sheriff and other officers to execute sentences. Particularly with the Charter of Rights, however, jurisdiction also represents the limits of the criminal law from the individual's perspective.

Inasmuch as the Common Law, preserved in Canadian criminal law by s.7 of the Criminal Code,[2] statute law and case law, are almost exclusively fashioned by men, in that most of the makers of such law are men, a reading of Holmes' definition of jurisdiction may be modified to state that 'the foundation of jurisdiction is the physical power of men'. Whether benign, favourable or otherwise, the preservation of all this power in the hands of men must disclose some bias in dealing with the female half of the population, as surely as a difference between the sexes exists.

8.2 Analysis

The application of the concept of jurisdiction commences with the competence of Parliament to enact the criminal law with due constitutionality.[3] An examination of the substantive criminal law today discloses relatively few offences which on their face create offences affecting women as opposed to men.[4]

Historically, however, there were many more offences designed to affect women, and the combination of repealed and remaining offences provides an intriguing tale.

For instance, s.216 of the Criminal Code sets up the offence of the infanticide. It contemplates a diminished responsibility for a mother murdering her newborn infant by reason of 'mental imbalance ... from the effects of giving birth to the child or the effect of lactation'. A similar exculpatory provision is found in s.543, which sets out procedures to determine whether a person is fit to stand trial.

The effects of childbirth or lactation are seen through these provisions to render a woman unfit to stand trial, i.e. incapable of comprehending the criminal process, and therefore in need of incarceration in a mental health centre if she is found unfit for this reason, or at best, not fully culpable for killing her child.

These sections are rarely utilized, although prosecution of mothers who have killed their infant offspring is not unknown. The question raised here is, assuming some rational basis for these exceptions, why is this one aspect of peculiarly female behaviour singled out? If indeed hormonal imbalances may be attributed to motherhood with this legal result, why are defences not specifically drafted in contemplation of the hormonal changes associated with the menstrual cycle?[5] Alternatively, if it is the actual stress inflicted by the care of the newborn child, should not a father with sole child care responsibilities benefit from this concept of diminished responsibility?

The picture may become slightly more clear when the other criminal offences which appear to protect women are considered:

(1) the sexual assault offences (s.246.1 et seq. of the Code);
(2) the offences regarding procurement and the other prostitution offences (ss.193, 195 and 195.1);
(3) intercourse with female person who is feebleminded, insane, an idiot or an imbecile (s.140, 1955 Code);
(4) previous prosecution barred for rape where victim is one's wife (prior to 1983 amendments to the Code);
(5) seduction of female person under 16 years of previously chaste character (s.151);
(6) seduction of unmarried female person of previously chaste character under 21 years of age, under promise of marriage (s.152);
(7) illicit intercourse with step-daughter, foster daughter or female ward, or employee of previously chaste character and under 21 (s.153);
(8) provision of necessaries of life by husband for wife (now inter-spousal obligation) (s.234 in 1955 Code, now s.197);
(9) previous abduction offences (ss.234 and 235 in 1955 Code);
(10) neglect to obtain assistance in childbirth or procuring a miscarriage (ss.226 and 251); and
(11) transport to a bawdy-house (s.194).

What do these enactments protect and how? These 'protections' constitute social control of women's sexuality, in order to preserve orderly reproduction practices within the confines of marriage. As has so often been expounded in the last 15 years,[6] women have been contemplated as chattels whose sexual and childbearing capacities may be subject to abuse. The will or consent of the woman appears to have had trifling significance formerly. The bonds of holy matrimony made a woman's consent to sexual intercourse irrelevant within marriage. With the category of stepdaughters and servants and female passengers on vessels, the issue of consent was again irrelevant: the illicit character of this activity made it a crime. The abduction offences formerly portrayed women as capable of being made off with, as so many sticks of furniture.

The continuing existence of the prostitution provisions weaves through the same cloth. Procuring women for illicit sexual intercourse, living off the avails of prostitution and keeping a common bawdy-house are serious offences: they are all indictable; and with respect to the group of offences subsumed by the heading 'Procuring', they are punishable by up to 10 years imprisonment. Contrast these serious offences with the regulation of the prostitutes themselves: regulated largely by the minor offence of 'causing a disturbance' or soliciting, refined by the courts to affect only 'pressing and persistent' behaviour, prostitutes themselves fall into the hands of the law only as so many flies making a nuisance of themselves. It is the wrongful control of women for sexual purposes and financial gain which is the serious offence.

8.3 Conclusions

The message from the foregoing is that historically, as women have been described by the criminal law in terms of substantive offences, women have no independent life or value; as child-bearers, sex objects, adornments and family accoutrements, they have value and must be protected. It follows that rules of evidence have classed women as incapable of giving independent evidence in some instances,[7] incompetent to testify against their husbands in other instances[8] and incapable of conspiracy with their spouses in some situations,[9] because of the legal fiction of conjugal unity.

In 1985, most of the sexual assault offences and legislated rules of procedure have been laundered so as not to bespeak distinctions between men and women. Infanticide and the related fitness provisions represents the most glaring exception to this modernization; the penalties and offences structure relating to prostitution yields this interpretation with somewhat greater subtlety.[10] What remains for examination is the unenunciated unformalized set of attitudes which work beyond the above-noted egregious betrayals of attitude. These attitudes permeate almost invisibly into the treatment of women involved in the criminal justice system.

8.4 Recommendation

1. In order to eradicate the impression that the criminal law takes jurisdiction over women as chattels and sub-human creatures, the criminal law should be reformed. The laws relating to prostitution and procuring need attention, as do the infanticide and 'seduction' type offences.

CHAPTER 9

INTERACTION OF CRIMINAL PROCEDURE AND THE CHARTER OF RIGHTS

9.1 Introduction

The enactment of the Canadian Charter of Rights and Freedoms[1] represents the entrenchment of certain rights and obligations between the individual and the State. Many of these had previous expression in the Canadian Bill of Rights, e.g. the rule against arbitrary detention, imprisonment or exile, and the rule against cruel and unusual treatment or punishment.[2] Others are fundamental to the Common Law and have found their way into statutory form prior to gaining constitutional protection. The right not to have to give incriminating evidence[3] and the right to due process[4] are excellent examples in this category.

A number of aspects of the Charter are novel, however, and bear some examination in the light of feminist analysis of the criminal law. One aspect is of direct significance to women, i.e. the combined impact of the equality provisions of ss.15 and 28 of the Charter.

The substantive application and significance of these sections is discussed at some length in Chapter 3. Some consideration of these provisions is merited as a matter of procedure. The equality sections provide particularly interesting conflict when taken in combination with the various fundamental freedoms protected by s.2 of the Charter, and with s.7, (which preserves due process and provides an entitlement to life, liberty and security of the person). The extent to which these rights and freedoms may be enjoyed equally by persons of both sexes depends on the manner in which they are enforced.

9.2 Procedural Enforcement of Charter Rights

Clearly the infringement or denial of these guarantees can be raised by way of defence in the context of criminal prosecution. They can be raised by way of preliminary objection to the jurisdictional competence of an enactment which might tend to take away the equal protection of the law without recourse to due process, e.g. a prosecution based on the presumption as to living on the avails of prostitution in s.195(2) may suffer upon such a challenge. The 'seduction' offences (ss.151 to 154) clearly disclose unequal treatment of the sexes, but whether their challenge will survive the 'demonstrable justification' test of s.1 of the Charter, as has happened in the U.S., is open to debate.

In Michael M. v. Superior Court[5] following sexual intercourse between a 16 year old woman and a 17 year old man, the man was charged with statutory rape. He claimed that the statute was invalid as being discriminatory. The U.S. Supreme Court found that the different treatment of the man and the woman was justifiable because there is a substantial difference between their positions. One of the suggestions was that women have the fear of pregnancy to prevent them from having 'illicit' intercourse whereas men need outside control. The judgment implied that the young woman was not able to make her own decisions about her sexual behaviour and was in need of protection.

By analogy to the Canadian test set up by s.1 of the Charter, the Court in Michael M. found that the unequal treatment for men and women in statutory rape legislation was based on a reasonable limit on an equality guarantee. Such unequal treatment might be said to favour women, but the advantage is an illusory protection since it maintains the myth that teenage women need protection against sexual relations while men do not because women are the 'weaker sex'.

Section 146 of the Code has already been found unconstitutionally discriminatory.[6]

In a family where a father has child-rearing responsibility virtually from the child's birth, and he is charged with causing the death of the newborn, the face of the legislation in s.216 would appear to give enormous benefit to a woman of which a man is deprived. Based on the notion of equal benefit of the law to either sex, diminished responsibility regarding infanticide should, however, enure to the benefit of a man as well as to a woman.

If one reads s.216 in the light of modern science, and attributes hormonal imbalance due to childbirth or lactation as giving the appropriate interpretation to the section, then a woman should be able to invoke equal protection of the law when charged with an offence allegedly committed when the hormonal balance was in its regular menstrual imbalance. The sense of this has been brought to bear upon the trial of a British woman, whose charge of murder (not of an infant) was reduced to manslaughter through recognition of the Pre-Menstrual Stress syndrome.[7]

Another experiment in invoking equal protection of the law in Canada is the possibility of positive injunctions against governmental authority. The combination of ss.15 and 7 of the Charter may require that women be afforded some additional outlay of government resources to ensure that no more women than men become victim of sexual assault. Of course, this may be an utterly retrograde notion in practice as it may simply serve to enforce prevailing notions of the 'frailty' of women, and curb our freedom to circulate and associate. In a Criminal Injuries Compensation proceeding, where a woman was savagely raped in her bedroom by an intruder who broke into the house at night, the police, opposing her entitlement to compensation, testified that a woman living alone in a ground-floor bedroom was leaving herself vulnerable. The comment of a Crown prosecutor as to who becomes victim of sexual assault may be the motto motivating such a positive injunction, should such be possible against the police: 'He was fond of saying that «nearly every girl that gets raped doesn't do the things the ordinary Canadian housewife does and the ordinary Canadian housewife doesn't get raped.»'[8]

Another area where the positive enforcement of the Charter may not be so much capable of backfiring is with respect to the prostitution offences. To a certain extent the number of 'customers' now being brought to court along with the prostitutes reflects a more equal enforcement of these laws. Arguably, however, if a prostitute is charged with 'indecent act' or 'causing a disturbance by impeding', the failure to arrest or prosecute the other party to the transaction may give rise to a bar to prosecution of the prostitute, i.e. the defence could move to have the information quashed on the basis of the equality sections of the Charter since the woman was charged while the man was not. Less quantifiable is the treatment given the different parties once they are brought before the court. Is the fact that the woman is given less respect and perhaps harsher treatment than the man susceptible to remedy?

Clearly the criminal offences relating to pornography and abortion raise questions of equal protection and benefit of the law. Their play in the political arena presently illustrates the conflicting considerations in interpreting s.15. These too have been discussed in Chapter 3. Two comments are appropriate under the rubric of procedure, however. One is again the possibility of moving for positive enforcement by class action on the part of the government to apply the notion of security of the person, in consonance with equal protection of the sexes, to the proliferation of violent pornographic material.[9] The success of such an action depends as a condition precedent on whether that damage can be quantified objectively. It also depends on the degree to which s.1 of the Charter would be seen to curb freedom of expression in that regard as a reasonable limit which may be demonstrably justified in a free and democratic society.

Even assuming hard irrefutable data showing that pornography deprives women (or men too) of their right to security of the person, does the historical role of pornographic material in a 'free and democratic society' prevent its availability as free expression under s.2(b) of the Charter? Procedurally, the first major hurdle would be passed once a prima facie case is established that a Charter right has been infringed by pornography. At that point the burden of proof (to show that the historical existence of such material and the rights of others to freedom of expression were not reasonable limits[10]) passes to the party seeking the limitation.

The final procedural query in this sketch is whether such an action could be brought as a class action, for presumably if the incursion on women's security can be established, it can be established with regard to the female population at large. It would not seem logical that one person might be so damaged by the circulation of pornographic material, and not all.

Similar considerations arise in asserting constitutionally protected access to abortion. Feminists are probably at least as divided on this issue as they are regarding pornography.[11] The additional issue here is whether men and unborn children have any status in the debate.[12]

Two comments as to procedure may be drawn out of these areas: first, how can protection be invoked with regard to the entire female population? Can such a mandate be assumed? Is it necessary in asserting such harm as some say pornography works? Secondly, once a prima facie case is raised, and the 'reasonable limits' test is presumably argued in opposition, does the patriarchal nature of 'free and democratic' society provide an insuperable 'Catch 22' ending to these challenges for equality?[13]

9.3 Legal Rights in the Charter

The legal guarantees contained in ss.10 and 11 of the Charter are, on their face, of equal application to men and women. The impact of these provisions (which deal with arrest or detention and criminal proceedings), as the impact of so much of criminal procedure, may well be different as between men and women. For example, since women are statistically far less likely to be charged in the category of serious crimes which entitle the accused to a trial by jury, equal access by Canadian women to trial by jury, under s.11(f), could be infringed. Two comments make short shrift of this claim however: first, the entitlement to trial by jury is only in cases of offences punishable by five years or more, and no one could claim that within the group of women charged with that category of offence the entitlement to trial is not there. Secondly, to cure the alleged infringement would either require more women to be charged with serious crimes or to treat the minor offences committed by women that much more seriously than the same acts by men by sending the women to jury trial. The net result of such a move would be to create immense inequality within the class of persons charged with similar minor crimes, with women bearing a greater onus. This is precisely the type of 'equalizing' feminist analysis which makes no sense in reality. It applies only a veneer of equality hiding the appearance of disparate treatment.

As trial by jury is implicitly a trial by one's peers, questions may arise in terms of the composition of juries. A few comments are appropriate here. First, in law a jury of one's peers does not require jurors of the same sex. Secondly, jury selection in Canada provides an extremely limited opportunity to inquire into the qualities of the jury candidates. Thirdly, a superficial observation of jury panels indicates that women are abundantly available for jury service.[14]

The provision of s.11(c) of the Charter, that a person cannot be compelled to be a witness in proceedings in effect against oneself, raises some questions in terms of the ancient legal fiction of conjugal unity, i.e. if marriage creates one legal person of the two, does this provision represent constitutional entrenchment of the non-compellability of a spouse under s.4(2) of the Canada Evidence Act?[15] In our view, the policy which maintained this legal fiction for so long is no longer socially useful and indeed is antithetical to the independent legal status of women. The reality of independent status must again be given separate consideration in evaluating the impact of criminal procedure and evidence rules on women. If women are unwilling to testify against their spouses, however, this should not be brushed off as a perpetuation of conjugal unity.

The last of the legal rights of the Charter which bear some examination in procedural terms are found in ss.9 and 12, the rules against arbitrary detention or imprisonment, and against cruel and unusual treatment or punishment. Once again, the little used provision of the Code, s.543(2)(b), permitting the question of fitness to stand trial to be raised and a remand for psychiatric observation to be made if there is suggestion of mental imbalance resulting from childbirth, in connection with the death of a newly-born child, may raise s.9 and 12 issues. Surely that detention is arbitrary if there is no demonstrable basis in fact linking mental imbalance with childbirth. On the other hand, if such a degree of imbalance may be connected with childbirth, it may be that Pre-Menstrual Stress syndrome may be a similar phenomenon giving rise to special treatment.

In any event, whether the Charter complaint relates to the practically unknown application of s.543(2)(b), or to incarceration resulting from some illicit pre-menstrual shopping spree, the reasoning of the courts to date in analogous situations would not permit a successful application of ss.9 and 12 of the Charter. The indefinite incarceration of the mentally-ill on the warrant of the Lieutenant Governor has been held to be neither cruel nor unusual nor arbitrary but rather as a matter of beneficial treatment for an unwell person.[16] Therefore, different treatment in law based on the biological uniqueness of women should be eliminated. To leave such recognition of difference is to perpetuate a view of women as fundamentally inadequate and infirm.[17] Nevertheless, further research is required in the areas of infanticide and the Pre-Menstrual Stress syndrome from the perspective of diminished responsibility.

9.4 Recommendations

1. Since s.1 of the Charter allows for reasonable limits to the rights and freedoms guaranteed by the Charter -- which are 'demonstrably justifiable' in the context of a free, democratic and patriarchal society -- it is important that a firm analytical basis be created in establishing reasonable limits. Feminist interests have been construed in so many ways, as the divergent views of pornography best illustrates. In order not to duplicate the American experience, where contradictory, irreconciliable interpretations of 'women's interests' have entered the jurisprudence, the development of principles should become a public exercise.

2. Litigation testing the possibility of positive obligations on government to ensure security of the person and equality in various contexts should be undertaken.

3. Public funds should be made available to underwrite such litigation.

4. The question of diminished responsibility, as contemplated by the infanticide provision of the Code, and as relates to the question of Pre-Menstrual Stress syndrome, should receive special attention, including the physiological, psychological legal and policy aspects.

CHAPTER 10

DISCRIMINATORY ASPECTS OF CRIMINAL PROCEDURE

10.1 Introduction

The remaining examination of criminal procedure will focus on five areas:

(1) laying of information and police investigation;
(2) arrest and bail hearing;
(3) powers of the prosecutor;
(4) plea bargaining; and
(5) preliminary hearing.

It is in this very large area that we must start and end with the assertion that more data is required to come to any firm conclusions, and proposals for reform, if need be. It is hoped, however, that this analysis based on impressionistic data, analogously related data and theoretical inference will be sufficient to provide the hypotheses upon which to structure empirical research.

The tableau of women in criminal law is to be used as an empirical backdrop for this enquiry into procedure. While most of the offences which portrayed women as chattels, ornaments and vehicles for family lineage and illicit pleasure, have been repealed and amended, the vestiges of these 'protections' remain, and provide some of the best illumination of the attitudes towards women in the criminal process. It should also be remembered that this view of women extends not merely to victims and women who are accused; but to all women, including police officers, witnesses other than victims, lawyers and judges.

10.2 Initiation of the Criminal Process

The initiation of the criminal process in law is by the laying of an information.[1] This may be done by the complainant or other concerned citizen or police officer who has reasonable and probable grounds to believe that an indictable offence has been committed. In the case of summary conviction offences, personal knowledge is stipulated as an alternative to and in addition to reasonable and probable grounds for belief.

In practice, an individual's complaint will be heard by a Justice of the Peace (J.P.), who will have an important role in determining which offence in law to charge. Whether it is a summary conviction offence or an indictable one is significant for many reasons; among them is the role which the Crown prosecutor will play. The Ontario Crown Attorneys Act[2] requires that a Crown prosecutor have carriage of an indictable matter. As well as importing the advantage of the immense resources of the Crown's office, it also places the discretion to proceed or withdraw in Crown hands.

While the Justice of the Peace is obliged to take an information, subject to the very minimal requirements of ss.455 and 723 of the Code, the question of issuing process, which requires the accused to come to court, is a matter for judicial determination by the J.P. It is entirely conceivable that an information may be received by a J.P., but that no process will issue. Thus the attendance before a J.P. is to little or no avail. The degree of formality in police responding to 'domestic disputes' has been documented in Detroit in 1978-1979,[3] and while the victim chose to prosecute in 60% of cases reported to the police, a warrant was requested in only 14% of cases and issued in only 9.4% of cases. These domestic disputes ranged from minor assaults to rapes.

In the context of this part of the Review it is complaints of assault perpetrated by husband against wife or children which are of primary concern. The history of police attendance to intervene in 'domestics' (i.e. wife or child assault) is well documented;[4] the experience in complainants' attendance before a J.P. in this jurisdiction is not as well known. In both situations, however, the fact of a family or romantic connection between the parties seems to colour the approach taken by police or J.P. An element of scepticism hovers, even though most murders are within the context of people who know each other.[5]

The role of police seems to be to bring an immediate non-judicial resolution to the dispute, often to reinforce the weaker party to the dispute, or provide a way out. If no charges are immediately forthcoming through the police intervention, or indeed if no police are called in, that circumstance may cause a J.P. to consider the complaint less meritorious. As a result, a lesser charge may be laid, or no process may issue. Particularly where the parties are known by the authorities to be given to fighting, the matter may be seen not so much as a matter of concern to the public peace and the criminal law, but more as a matter between the parties and to be resolved in family court (a court with jurisdiction over family matters).

A peace bond may also be entered into by one or more persons.[6] No conviction is registered, nor are the protections of the criminal law available to the offending party. It is expeditious, however, and resolves an apparent gap in the substantive criminal law with respect to threatening. Section 331 of the Code, the 'threatening' offence, does not prohibit directly uttering a threat: the means of telephone or letter or the like must intervene before the offence is made out. Clearly the incidence of truly frightening threats as between husband and wife which are susceptible neither of prosecution under ss.331 nor 245 (assault) is significant, yet it can only be dealt with by means of peace bond. Perhaps more a substantive gap than a procedural one, this is nonetheless an area where the law is disadvantageous to the interests of women, since a peace bond may be inadequate to deal with the problem at hand. The failure of positive law is compensated by the Common Law jurisdiction of the Justice of the Peace to keep the peace.[7]

When police attend and initiate the information, they follow up with investigation. Witness statements are taken at a variety of locations. The manner in which the perceptions of women witnesses are elicited and preserved is a matter worthy of study. The social history which views women as someone's daughter, mother, wife or girlfriend often seems to weigh in the significance of that person's evidence: it is secondary information, it is coloured by the person's relationship to the men on the scene, if any, and the manner in which the police officer seeks the information often reflects the perception of woman as secondary actor. This is particularly of concern where the woman's perception of herself is as a person to be protected, a subservient one whose interests are protected by giving the right answers and whose protectors are men. The historical role and perception of women, especially those connected with crime as victims or accused, is such that one must acknowledge differential treatment. Consequently, in the witness box, and in the judicial process of weighing credibility, one anticipates a subtle but persistent bias overlaid on the words of women.

Subtle though this may be, the area of women's credibility and the manner in which their perceptions are dealt with is worthy of some study, in order to formulate a basis for proposing reform if necessary. Likely, the reform should come at the attitudinal level.

The matter of women's attitudes towards giving testimony has become the focus of some attention in recent years in rape prosecutions. Classically, the judicial process has witnessed the reluctance to testify on the part of women accusing their husbands of assaulting them. The practice of prosecutors allowing them to withdraw their complaint seems to have lessened somewhat in recent years, in favour of the recognition of a public policy requiring the prosecution.

Where the prosecution does proceed despite the reluctant witness, courts have recourse to indefinite incarceration until the witness recants at the preliminary hearing stage,[8] and to the Common Law power of contempt of court, where the refusal to testify is at the trial stage. Several questions arise: is the woman not testifying out of fear? If that is so, surely the wrong person is being punished.

Police efforts should be directed to the source of threat by incarcerating or segregating the man involved. Is it because there has been a reconciliation and the witness' personal life and perhaps source of income is at risk due to an incident long since resolved? If that is so, perhaps the matter should be viewed as private in nature, and not worthy of criminal prosecution. But if the criminal process is significant as declaratory of what society will tolerate, perhaps the reluctant witness should be compelled to testify (or the charge should be dropped), and her reluctance taken by the judge as a factor going to the weight of her evidence, or possibly to an inference of consent to the alleged assault or to sentence of the accused.

Clearly, the reluctance of witnesses in these situations may be based on factors other than their ability to tell the truth. A global consideration of the conjugal reality frequently results in a favourable result for a male accused: either (1) the wife withdraws charge, or (2) the complainant in sexual assault is disbelieved before the matter gets to court for reasons not germane to the complaint itself or the victim refuses to testify, or (3) the accused in a sexual assault is acquitted by reason of his mistaken but honest belief in consent.

10.3 Judicial Interim Release

Returning to the chronological unfolding of a criminal complaint, it is frequently at the stage where a man accused by his wife is held for bail that a financially dependent wife starts to realize that his arrest is a double-edged sword. She may have stopped a fight by calling in police, but her ongoing physical well-being is jeopardized by the incarceration of the 'bread-winner'. Indeed, even if the man is released and continues to contribute to the family support, the bail order may require him to live elsewhere, thus imposing additional strain on the family finances and the family as a social unit. Often judges determining judicial interim release are reluctant to enter into what they consider the domain of the family court. This may result in the necessity to seek a companion support order from the family court, when the criminal court judge has ordered non-association.

There are a few special considerations affecting the granting of judicial interim release to women. Certainly family responsibilities, particularly child care, militate in favour of release. Raising the spectre of a children's aid society taking the children if the mother is not released may not be of help, however. The possibility of intervention by such a body only reinforces the court's bias against a woman accused as not worthy of child-rearing responsibilities.

A rather unique procedure may be observed at bail hearings in some metropolitan areas, especially those near the U.S. As the court is required to set cash bail for an accused residing more than 100 miles away,[9] prostitutes who are 'just visiting' may have the opportunity to dispose of the entire charge simply by posting a cash bail and considering that the fine for the offence. More to the point, judges ensure the payment of a fine if the defendent does not attend for trial. On the other hand, those who have no resources, being from out of town, and who wish to plead not guilty, may find themselves in jail for longer than they would be if sentenced, all for want of $100 or so. This problem with the criminal law is not restricted to women charged with soliciting, but it likely affects a significant percentage of women charged with criminal offences due to their economically disadvantaged status.

The final observation about women and bail applies to other stages of the criminal process. It relates to the perception of dangerousness or just plain badness of a woman. In considering judicial interim release, a judge must consider effect on the public interest in releasing an accused, if there is no concern about the person's return to court to face the charges.[10] Impressionistic data suggest that it takes fewer incidents of less violent or dishonest conduct to place a woman in the upper echelons of public enemies, than it does for a man to be seen as very bad. This perception is borne out to a certain extent by American studies of 'female delinquents'.[11] Without predicting how the data might be applied, some analysis of the perception of badness or dangerousness in women would be useful in the contexts of bail, sentencing and dangerous offender application. It may permit some application under the Charter of Rights if disparate treatment is accorded like offences simply on the basis of the sex of the offender.

10.4 Powers of the Prosecutor

As has been outlined above, while the Crown is obliged to take carriage of indictable offences where a private prosecution reaches the court, he or she may take on the prosecution even if it is a summary conviction offence. The enormous difficulty which may be encountered in the latter situation is that the Crown may choose to withdraw the information from the court, since he or she appears to have unfettered discretion to do this before arraignment.[12]

The disadvantages of a private prosecution are that first, it will not be an indictable offence; secondly, it is often looked upon somewhat askance by the judge; and thirdly, it will not have the considerable advantage of the Crown's resources in investigative and prosecutorial prowess. Yet often one hopes for special skills in the prosecution of certain matters. Just as outside counsel are appointed for the prosecution of police officers or other prosecutors, it is proposed that specially qualified prosecutors be employed in certain areas, e.g. wife assaults, child abuse and pornography.

Another stage at which the Crown's election impacts upon the criminal process is with regard to hybrid offences. Simple assault (s.245 of the Code) and simple sexual assault (s.246.1) offer the option of prosecution by indictment or by summary conviction procedure. It would be interesting to study what factors appear to influence Crown elections where one or both parties are women. On the one hand, an election to proceed summarily tends to trivialize the matter, and offers a lesser maximum penalty. On the other hand, where there is the possibility of a reluctant female complainant, or simply in order to spare her testifying twice, it may be a favourable option.

10.5 Plea Bargaining

It is a necessity in modern Canadian criminal procedure that the courthouse corridors are a marketplace for guilty pleas. With approximately 70% of cases disposed of by way of guilty plea, it is certain that the already overburdened facilities of the criminal justice system would be entirely crushed if any greater percentage of cases were actually tried.[13] Their responsibility for the administration of justice gives Crown prosecutors an interest in ensuring the most expeditious disposition of cases. Knowing this, and knowing also that in most cases a conviction for some offences is the likely outcome for most accused persons, defence counsel take advantage of the opportunity to 'make a deal'. Most frequently, the deal is an exchange of guilty plea for agreement to range of sentence, or to the Crown proceeding on a lesser charge, or on fewer counts than actually charged. Sometimes the terms of the bargain are on a purely 'rough justice' basis, sometimes there is the consideration of 'what the Crown can prove'.

A few comments may be appropriate in bringing a feminist analysis to bear here. In a situation where the woman is the victim, there appears to be growing sentiment that the victim should be consulted before a certain abbreviated version of facts is accepted. This, of course, applies to more than offences where women are victims. The sentiment is similar to that expressed by women who want to personally express their sentiments at a sentencing hearing. While understandable, caution must be exercised in order that the criminal process not be used for personal dispute resolution, or for vengeance. It is the offence against society which is prosecuted, not the tort between the parties.

The advantage to a complainant of a plea bargain is considered to be the fact that she is saved the inevitably stressful ordeal of testifying. Indeed, sparing the complainant her ordeal is frequently a bargaining point, and a mitigating factor on sentence. Defence counsel must, however, beware the prosecutor who is too willing to spare the witness. This kindness may disguise the fact that the witness' testimony cannot support the allegation. The denunciatory effect of such testimony in both wife assaults and sexual assaults must have some socially salutary effect, however, which should not be entirely overlooked by the kindly paternalism of the prosecutor who wishes to assist the 'poor woman' by not making her testify.

A final comment about plea bargaining bears on attitude too, this time toward a woman accused. Although it is difficult to determine who should do so, surely some caution should be exercised in obtaining agreement to guilty pleas from women who bend all too easily to pressure, especially from so powerful a source as a male counsel might be. So many women accused of criminal offences have so little self-esteem, and so many of them are charged as parties not principals, that even in pleading guilty they do not consider the significance of their admissions of fact through a guilty plea. By simply standing by and 'doing nothing' at the scene of the offence, then standing by and again acquiescing to whatever was proposed in court, some women (and doubtless, men too) have acquired sizeable criminal records.

10.6 Preliminary Hearing

The comments made earlier with regard to plea bargaining frequently apply here to mean that no evidence will be heard on preliminary hearing, and that upon agreement as to facts, a guilty plea will later be tendered in a superior court of criminal jurisdiction. For litigious matters, however, in the case of sexual assault, wife assault or any other sensitive credibility assessment, it is at this stage that considerable inroads may be made on the strength of the Crown's case. Even though a committal for trial at the end of a preliminary hearing requires very little evidence, counsel will be very busy testing the evidence of the complainant. Some counsel will make it so unpleasant for the complainant that she simply will not return to testify. Some complainants can become so confused or internally inconsistent that their evidence is irreparably damaged once it comes before a jury. One can only suggest extensive 'woodshedding' (witness preparation) of witnesses to bolster them against the rigours of cross-examination.

The other extreme is the witness who refuses to testify. As mentioned earlier, the Criminal Code provides a special mechanism: sending a witness who without reasonable excuse does not testify on a preliminary hearing to jail for eight days at a time. In the reported case law relating to this section, the courts do not appear to have considered whether fear of reprisal or concern for an ongoing marriage might constitute a reasonable excuse.

Indeed, in one unreported case, where a man was charged with attempting to murder his wife, a provincial judge found that the public interest was not served by deeming the witness' concern for her marriage. He denied the witness' application under s.472 saying that it was not a reasonable excuse, and committed her to jail.[14]

In the case of a much-publicized rape prosecution in Ottawa, the witness applied to the court to quash the subpoena, on the ground that it interfered with her right under the Charter to security of the person.[15] She was fearful for her physical safety, and she was suffering enormous stress and anxiety. The court found that her fear and trauma were not caused by government action; that '(a)nxiety and stress, as real and as unpleasant as they may be, are not enough to qualify as infringements of the security of the person'[16] and that even if there had been some interference with the security of her person caused by government action, it was infringed 'in accordance with the principles of fundamental justice'.

What is perhaps most significant in our context is the manner in which Mr. Justice Linden deals with whether, in an extreme exercise *ex hypothesi*, such an alleged violation would have been a reasonable limit under s.1 of the Charter upon the right to security of the person.[17] Thus, in balancing the convenience to the witness in not testifying, against the interests of society in prosecuting her assailant, the latter interest wins out. This is an important signal as to how s.1 will be used with respect to women's issues, *i.e.* women should not be dealt with as the 'weaker sex' whose personal protection is the primary concern of the criminal law, and they should not be given the kind of preferential or deferential treatment which has helped to imprison women as second-class citizens.

10.7 Conclusion

There is very little in the positive law of procedure which on its face discriminates between the sexes. Thus, much research of practice must be developed in order to comment authoritatively on procedure. In any case, an examination of what appear to be problem areas suggests that the answers are in policy, not in law reform.

10.8 Recommendations

1. Data are necessary in order to demonstrate the impact of these areas of procedure on women.

2. Topics of interest should include:

(a) bail terms for men accused of wife assault;
(b) numbers of prostitutes posting cash bail and not returning for trial;
(c) numbers of prosecutions for sexual assault where the failure of complainant to testify was a factor in working a guilty plea;
(d) numbers of prosecutions for sexual assault where the complainant's testimony at preliminary hearing was a factor in the accused tendering a guilty plea at trial;
(e) number of prosecutions for sexual assault where the complainant's reluctance to testify was a factor in withdrawal of charges or in the matter resulting in acquittal;
(f) reasons for complainant's reluctance to testify in sexual assault matters; and
(g) survey of private prosecutions taken over by Crown prosecutor.

3. Sentencing principles should be developed with respect to assaults in the framework of any type of personal relationship, especially wife assaults.

CHAPTER 11

EVIDENCE

11.1 Introduction

The law of evidence has never been the subject of comprehensive feminist analysis in Canada. Its importance to the handling of cases brought before the courts and its probable effects on women's rights justify taking a careful look at the various provisions in this area, eliminating those that clearly discriminate against women, and identifying those that need to be changed.

The law of evidence is the product of social constraints and values, and the principles and rules formulated are based on a preference for certain values over others, and a concern for efficiency. Under our adversarial system, the burden of producing evidence is on both parties, and the judge arbitrates the proceedings. The basic principle is that all relevant evidence is admissible according to reason and experience. Even at this point, the notion of relevance is open to interpretation and may give rise to controversy. For example, what is considered relevant to the issue in a given case may be clearly discriminatory in the eyes of women.

In addition to the criterion of relevancy, there is the court's right to exclude a piece of evidence if it feels the damage caused by such is an applied science subject to the courts' experience and there is no set of uniform rules of evidence, the variety of the court decisions in this area is equalled only by their number. There are many sources for the law of evidence.

(1) the Canadian Evidence Act,[1] which deals with the administration of testimony and documentary evidence. The Act applied to all matters in which the Parliament of Canada has jurisdiction;

(2) the Criminal Code,[2] which contains provisions pertaining to evidence, *e.g.*, corroboration (ss. 123, 195, 246.4, 256, 325 and 586), as well as provisions setting forth exceptions to the general rule of burden of proof (*e.g.*, presumptions); and

(3) the common law, which plays a complementary role with respect to the law of evidence (s. 7(2) Cr.C.) and remains the major source for this law, since it deals with rules of admissibility and exclusionary rules (*e.g.*, hearsay).

After examining the various rules of evidence found in the sources mentioned above, we have selected only some of them. We should point out that since our examination was somewhat fragmented, it cannot be considered a detailed, exhaustive and in-depth analysis of the law of evidence. We simply looked at the actual basis or foundation of the rules of evidence, i.e., the adversarial system, and its effect on women's rights. It would perhaps have been appropriate to study the root concept of criminal law in this country - the presumption of innocence and proof beyond all reasonable doubt - and decide whether it should be challenged. After careful consideration, however, we came to the conclusion that so basic a principle would not benefit from being changed, for two main reasons: first, neither this not any other principle (preponderance of evidence, e.g.) will give female victims greater credibility, and second, the principle ensures that accused women are presumed to be innocent.

11.2 Recent complaint

11.2.1 Introduction

This exclusionary rule appears in s. 246.5 of the Criminal Code. Historically, the doctrine of recent complaint was an exception to the rule for prior consistent statements. The general common law rule is that a witness's previous statements are inadmissible since they constitute self-confirmation of one version of the event.[3] They represent superfluous evidence that adds nothing to the issue at hand.

In cases involving sexual offences, a previous statement was admitted only to demonstrate the consistency of the victim's version of the event. This exception was introduced because rape was such an odious crime that the victim would be quick to raise a hue and cry against the aggressor in order to denounce the crime at the first opportunity.[4] Originally, courts admitted only evidence that the complaint was made; later, evidence of the contents of the complaint was also admitted. The complaint had to be made at the first reasonable opportunity, and it had to be made spontaneously.[5] Thus, the rule allowed the Crown to combine to a recent complaint with a prior consistent statement made by the victim, in order to establish the similarity of the victim's narrative or testimony.[6] However, because the requirements of this exception were based on the assumption that any assault would lead to a complaint, judges began commenting on the absence of a complaint and, incidentally, inviting juries to draw an adverse or negative inference as to the victim's credibility.[7] Use of this procedure continued despite the fact that the victim was not given an opportunity to account for the delay in making a complaint, and despite the difficulties experienced by the victim.

Because there was so much opposition to these interpretations, and as part of a trend toward 'consideration for the victim,' the rule of recent complaint was repealed on

January 4, 1983.[8] In order to avoid any possible confusion,[9] s. 246.5 was worded so as to make it perfectly clear that the rules respecting recent complaint were abrogated.

11.2.2 Analysis

Given that this section came into effect a relatively short time ago, it is difficult to say is it is meeting the desired goals, which are to change the way a victim of sexual assault is typically perceived, and to eliminate the negative effects of this perception. However, a number of questions and comments arise from the case law that has so far been consulted and from analysis of this provision.

To begin, one might ask if s. 246.5 applies only to cases of sexual assault (that is, those cases covered by the new amendments), or it it extends to other sexual offences (for example, incest and illicit sexual intercourse (ss. 150 and 146 Cr.C.). Before the changes, the doctrine of recent complaint applied not only to sex-related offences, but to all these offences.[10] In light of Bill C-127, is this doctrine limited to the three types of assault mentioned; i.e., offences where there is an absence of consent? Assuming that evidence of a recent complaint does not have probative force with respect to consent, but rather that it has an effect on the victim's credibility, abrogation of this rule affecting credibility and not consent should, in consequence and a contratio, apply to all sexual offences.[11] What is more, it would be illogical to claim that the abrogation applies only to cases of 'sexual assault.'[12] Moreover, the argument to the effect that the general rule that allegations of recent fabrication would admit evidence of a recent complaint if the complaint is relevant to the issue at hand, namely in cases where there is an absence of consent, would tend to limit the scope of the abrogation of the rule to sexual assault.[13]

Here again, interpretation by the courts is important for determining the scope of this provision. Making the wording of s. 246.5 clearer would result in uniformity of application and would avoid differential treatment of victims of sexual assault.

Apart from the question of the scope of s. 246.5, what is its significance and what effects does it have? Will there be a way of proving that the victim made a complaint at the first reasonable opportunity? Will the defence be able to raise the absence of such a complaint? What about the cross-examination of the victim concerning the events that took place after the incident?[14]

Abrogation of the rule should mean that the prosecution no longer has to prove that the victim made a complaint about the offence at the first reasonable opportunity, the purpose of this being to rebut any adverse presumption. However, will this presumption be eliminated from the minds of the jury? Instructions should probably be given to counter the possibility of adverse inference.[15] One author has quite rightly likened the abrogation of this rule to the abolution of the rule on corroboration: neither will prevent a judge from commenting on the evidence and helping the jury decide how much weight should be given to that evidence.[16]

Section 246.5 of the Criminal Code also means that the recent complaint is subject to the ordinary rules of evidence on prior consistent statements, which are, in principle, inadmissible. The recent complaint could, however, be admissible as part of the res gestae or to rebut an allegation of recent fabrication.[17] It may be admitted like any other previous statement, the intent being to restore the victim's credibility. According to the authorities,[18] abolition of the rule would not prevent the Crown from asking a victim is she made a complaint. This question would also be acceptable during cross-examination, although the details would not be admissible. Evidence of the contents would be admissible only if that evidence satisfied the terms of a rule of evidence such as excited utterances, rebuttal of an allegation of recent fabrication, or prior inconsistent statement.[19]

The effects of s. 246.5 and the interpretation of it by the courts are demonstrated in the legal decisions rendered on this issue to date. In R. v. Pagé,[20] the judge admitted evidence that the victim made a complaint, but did not allow the contents of the complaint to be divulged. He ruled that the complaint was an excited utterence and not a narrative. Further, the judge declared that the effect of s. 246.5 is to put sexual assault in the same position as other offences, and pointed out that the timing of the complaint about such offences is relevant to the issue of credibility. In addition, the defence would be able to cross-examine the victim about the absence or delay in making a complaint and ask the jury to draw an adverse conclusion from this. If the defence were to allege recent fabrication, it would then be possible for the Crown to produce evidence of the current complaint.

The matter under dispute in R. v. Colp[21] was whether a complaint made at the first reasonable opportunity was admissible to support the complainant's credibility. The judge concluded that s. 246.5 should serve to ease the burden on the Crown, at the same time allowing it to produce evidence of a complaint that is part of the res gestae or closely linked events, and to allow the Crown to produce countering evidence concerning the victim's version.

Two other cases have dealt with s. 246.5. In R. v. Mohr,[22] the judge held that s. 246.5 prevents the Crown from producing evidence of a recent complaint but does not prevent it from producing evidence of the victim's emotional state. The judge added that such evidence remains circumstantial, and the jury may consider it as corrobotation of the victim's testimony. If s. 246.5 prevents the Crown from producing evidence of a recent complaint, it necessarily bars the defence from cross-examining the victim about the absence of a complaint.[23]

It is clear, then, that the courts have differing interpretations of the effects of s. 246.5, and no decision has been handed down by a higher court to indicate what the consequences of this provision will be. The courts must clarify these effects in order to avoid the possibility of the provision causing a loss of ground or running counter to the objectives of Bill C-127, which are to put an end to harassment of victims, and to encourage victims to make complaints.

The problem is not resolved by the reforms proposed in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence.[24] The report suggests abolition of the doctrine of recent complaint with certain exceptions, among them the possibility of producing evidence of the complaint when the absence of consent is at issue and of producing evidence of the contents of the complaint when the defence attacks the complainant's credibility as a recent fabrication or prior inconsistent statement. This provision, which was a reflection of the one in Bill C-53,[25] was widely criticized for its poor wording and its ambiguity. We were also unable to find an answer in Bill S-33.[26] There is no clause on recent complaint, except indirectly: s. 118 deals with prior consistent statements. If this Bill were adopted, the courts would interpret s. 246.5 Cr.C. in conjunction with s. 118 of the new law, and we would be faced with the same problems of interpretation encountered in R. v. Pagé.[27]

11.2.3 Conclusion

If the new legislation is to be a reflection of a new reality and is to take women's rights into account without any appearance of discrimination, it is essential that the effects of each clause be clear and that they give rise to progress. Clearly, abolition of the doctrine of recent complaint should correspond to full recognition of the credibility of a victim of sexual assault, with no prerequisites or conditions for such credibility. In other words, if a victim does not make a complaint immediately after the incident, one should not conclude beyond any doubt that she is not credible, or infer that the story she is telling must be examined under a microscope.

If the interpretation of the courts leads indirectly to the conclusion that a women who does not make a complaint casts doubt on her own credibility, then the clause has no curative effect. If legislation is to recognize the real situation of women who are victims of sexual assault (their differences, their reactions, their individuality, and their reluctance to make a complaint and subsequently to take legal action), it must not hold against them the fact that they do not make a complaint at the first reasonable opportunity.

We should add that the legislation is still new, that it is an improvement over the old laws, and that more court decisions will help us better evaluate the handling of this provision.

11.2.4 Recommendations

We recommend conducting a study of the decisions and an evaluation of the courts' interpretation. If clarification of the wording of s. 246.5 is needed to extend the scope of its application to all sexual offences, the provision will have to be amended, although we feel that the courts' interpretation of the applicability of this provision will not require such an amendment. It all remains to be seen.

As regards the impact of the repeal of this rule, the decisions should be studied, and the interpretation of each of the following points examined:

(1) admissibility of the absence or existence of a complaint;

(2) admissibility as part of the *res gestae*;

(3) admissibility to rebut an allegation of recent fabrication; and

(4) the existence or lack of specific instructions.

Because the effect or absence of this evidence is difficult to determine, it would be appropriate to conduct an experimental study in order to measure the impact of these variables on the final decision.[28] This study could give us some indication of the effect of such things as the absence of a complaint by the victim, the persisting negative perception of the complainant in cases of this type, and, by extension, the need for specific instructions.

11.3 Competence and compellability of spouses

11.3.1 Introduction

The competence and compellability of a spouse are outlined in s. 4 of the *Canada Evidence Act*. Because a husband and wife were originally considered a single entity under the rules of common law, and in the interest of preserving the marriage, rules were established as a function of these values. The principles currently in use are as follows:

(1) The spouse of the accused is not a competent witness or the prosecution (according to common law);

(2) He or she is a competent witness for the defence (s. 4(1) *Canada Evidence Act*); and

(3) He or she is a competent and compellable witness for the prosecution for the offences listed in ss. 4(2) and 4(3.1) of the *Act*, and common law offences (s. 4(4) of the *Act*) against his or her spouse's person or property.

Existing jurisprudence indicates there is some uncertainity with respect to interpretation on a number of points. First, it is not clear whether competence inplies compellability in the cases referred to in s. 4(4) of the *Act*. According to British case law, the two concepts are independent.[29] However, in *R.* v. *Czipps*,[30] competence was said to lead to compellability. It is also unclear whether, for this type of offence, a voir dire should be held to determine competence or compellability,[31] or whether the charge should be accepted at face value. Under the present law, a spouse is a competent witness for the defence (s. 4(1)), but there is no indication that he or she is compellable (for example, a women who does not wish to testify for her husband). To be sure, situations of this type are rare since, in practice, an accused person would not ask a *reluctant* spouse to testify. Further, under the *Canada Evidence Act*, there is nothing to suggest that a spouse is incompetent for the Crown: for this we must refer to common law.

The competence and compellability of a spouse are dealt with in Bill S-33[33] in ss. 91 through 94. After establishing that every person is competent and compellable to testify in a proceeding (s. 86), the Bill states that a spouse is a competent and compellable witness for the defence when there is only one accused (s. 91). When two or more persons are jointly accused, a spouse is competent but not compellable (s. 92). Under s. 93, a spouse is competent for the Crown, but is compellable only in certain cases.

Briefly, Bill S-33 serves to clarify existing provisions in the following ways:

(1) it makes a spouse competent and compellable for the defence;

(2) it stipulates that at spouse is not compellable when two or more persons are jointly accused;

(3) it changes the existing law by making a spouse competent for the Crown; and

(4) it specifies additional offences in respect of which a spouse is compellable: infanticide, murder, manslaughter, murder of a child, attempted murder, and neglect to obtain assistance in childbirth.

11.3.2 Analysis

The provisions of the Canada Evidence Act and Bill S-33 serve to enshrine and preserve the common law rule aimed at protecting the marriage. In theory, s. 4 of the Act protects both sexes equally; in practice, it affects women to a greater degree.[33] From the viewpoint of absolute equality, specifying the competence of a spouse in this matter is unjustified, given the general rule that every witness is competent. Political, social and legal equality are grounds for repealing these special provisions regarding spousal competence as a witness. The current restrictions deprive the spouse of a basic human right. It seems inconsistent with modern social conditions to prevent a person from exercising a right that everyone else has, in the name of protecting that person's marriage.[34] The individual is in a better position than the State to make a choice.

When a woman decides to testify in a criminal proceeding, her relationship with her husband has clearly altered to the point that she does not need special status characterized by marital ties. Her status as a witness need not be made subordinate to her marital status. Further, a rule of evidence that allows a person to prevent his or her spouse from testifying is further hindrance to the aims of justice and characterizes the traditional relationship in a marriage.[35] The law seems to favour protection of the marriage at the expense of each spouse's freedom.

Does a person's competence depend on his or her status? Should we not consider every person a competent and compellable witness? In light of their current situation, are women better protected by this rule? There are no studies that enable us to give a categorical response to this question.[36] Would modifying the present rules result in a purely theoretical change? Does the fact that the law now states that a person is obliged to testify in certain cases not ease the burden on the spouse? If a woman wishes to testify against the accused, can a legal impediment designed to preserve the marriage be justified? How must the law react if a person refuses to testify? There is also a danger is making a spouse competent for the Crown, since the spouse is then placed in a situation where he or she must either testify against the accused or be held in contempt of court and where, as a result, the weight of a spouse's testimony or even his or her credibility may be more subject to attack.

In its Report on Evidence, the Law Reform Commission of Canada lays down the principle that generally all witnesses may be compelled to testify.[37] Its comments on s. 54 read, in part, as follows:

> The other ground of incompetency, marital relationship, is abolished by the section since there seems little reason to prevent a person from testifying for or against their spouse if they so desire and the evidence is sufficiently probative.[38]

In s. 57, the Commission requires the judge to weigh the conflicting interests and decide whether the interest in preserving the relationship outweighs the need for the testimony, and gives the judge a discretion not to compel a person to testify. It should be noted that this exception to the rule applied not only to the spouse of the accused, but also to all family relationships. On the other hand, the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence[39] recommends that one spouse be compellable at the instance of the accused spouse, that a spouse of an accused be competent and compellable for the Crown in proceedings pursuant to certain offences, and that the definition of 'spouse' be limited to a legal marriage.

11.3.3 Conclusion

It is interesting to compare the recommendations of the Law Reform Commission against those of the Federal Provincial Report on Uniform Rules of Evidence. The Law Reform Commission would extend the possible protection of this privilege against giving evidence to all persons related by family ties to the accused, while the Federal Provincial Report is so narrow as to restrict the application of the rule to legally-married spouses. No consideration is given from an analytic point of view as to the impact of either proposal in a society where so many families consist of children of unmarried but stable couples. No consideration is given to homosexual couples. And no consideration is given to the common modern phenomenon of re-marriage and the novel family structures that may entail.

In the situation of a couple who have been living together for many years and who have children together, and who may also have children from other relationships, who would constitute family? Would uncles and grandparents come into the ambit of family to be protected by the Law Reform proposal? Where there is no legal marriage, do close friends of the 'family' fall within the proposed protection? Clearly the Law Reform Commission's proposal can lead to absurd applications. On the other hand, the Federal Provincial proposal would appear to be far too narrow to accommodate today's realities. The voir dire procedure proposed by the Law Reform Commission may be a way around these problems.

Yet, these differing proposals indicate the erosion of the rationale for this type of protection. Perhaps the protection against compellability of spouses has reached the end of its useful life. In any event, an end to spousal protection is on balance preferable.

11.3.4 Recommendations

An amendment to the Canada Evidence Act is needed concerning the competence and compellability of a spouse. The competence of a witness as a person should outweigh considerations of status or marital relationship. In short, respect for the rights of the individual should be the guiding principle in drafting any new legislation, and should serve as the basic rule. A study of women who have been called as spouse-witnesses would certainly help us modify this basic rule - if necessary - and to establish parameters. More detailed study of this matter is called for.

11.4 Privileged communication

11.4.1 Introduction

Our comments here will be brief since they are basically a recapulation of those made in the previous section dealing with competence and compellability.

As the law now stands, no person is compellable to disclose any communication made to him or her by his or her spouse during their marriage (s. 4(3), Canada Evidence Act). The purpose of this privilege is to protect the marital relationship and encourage open communication between spouses. If there a real need for this privilege?

11.4.2 Analysis

According to certain authors,[40] there is still some doubt as to whether this privilege ever really existed in common law. According to Wigmore,[41] the privilege existed, but was rarely used because spouses were incompetent as witnesses, and because this situation was most exceptional. In any event, it is clear that this issue has not been the subject of much controversy in Canada. From our review of case law and the textbooks, and despite the absence of information on the frequency of use of this privilege, the following points emerged:

(1) The privilege mentioned in s. 4(3) of the Canada Evidence Act is poorly worded and of limited value.

(2) It does not apply to documents of a private or confidential nature,[42] nor to children or other family members.

(3) It may be claimed only by the person who received the confidence, and concerns only the husband and wife;[43] and

(4) It ceases to exist upon dissolution or annulment of the marriage,[44] any may not be invoked by a spouse who is compelled to testify by the prosecution.[45]

If we look closely at the changes proposed in Bill S-33,[46] we see that they give greater weight to this privilege. The Bill clarifies the definition of 'spouse' by specifying that it means spouse at the time a statement is made. Thus, the loss of the status at the time of trial does not prevent the person from invoking this privilege. The Bill further stipulates that it is the declarant who is entitled to claim this privilege, and that the privilege ceases to exist upon the death of the declarant.[47] Statements made by a person to his or her spouse are presumed to have been made in confidence,[48] and the privilege may be claimed by the declarant or by his or her spouse on his or her behalf.[49] Bill S-33 also sets out exceptions: cases where the declarant's spouse is compellable; and cases involving an offence against a third person alleged to have been committed by the declarant in the course of committing an offence against his or her own spouse.[50] The right to claim the privilege is lost is the declarant consents to the disclosure.[51] In short, this Bill strengthens the right of privileged communication by stipulating that it is the declarant who is entitled to this privilege, and that the privilege subsists throughout the declarant's lifetime. It creates a presumption of confidentiality, and extends the privilege to include all statements.

The Uniform Law Conference of Canada clearly has not accepted the recommendation of the Task Force, that this privilege be abolished.[52] In making this recommendation, the Task Force referred to the proposals put forth by the Ontario Law Reform Commission[53] and the Criminal Law Revision Committee of England,[54] both of which suggested abolition of the privilege.

11.4.3 Conclusion

We have absolutely no information on how this privilege is used and how many spouses are aware that it exists. Our conclusion will therefore be limited to theoretical aspects. Should we continue to protect a person's right to disclose to his or her spouse such things as the commission of a crime? Or should such a privilege be abolished? According to Wigmore:

> This marital privilege is the merest anachronism in legal theory and is an indefensible obstruction to truth in practice.[55]

Our earlier comments on protecting the marital relationship apply here as well. If it is a question of protecting the marriage, this privilege must be maintained.[56] If, on the other hand, the family unit is to be protected, the privilege must be extended to all family members. It was from this standpoint that the Law Reform Commission dealt with the subject.[57] In the Commission's Report on Evidence, s. 40 makes spousal privilege a family privilege, thereby extending it to all family members, not the spouse alone. The Commission also suggests giving the judge discretion to allow or disallow the privilege in the light of circumstances.

If it is a question of protecting or recognizing the individual, the privilege must be abolished. At present, the privilege affects married women only and is unfair to women in general because it rests with the declarant. In many instances, the wife is the recipient of the confidential statement; she is more likely to have to decide whether or not to invoke this privilege, and therefore more susceptible to pressure. Moreover, in cases of compellability, the privilege ceases to exist, and the wife may be compelled to divulge a privileged communication.

Whichever option is taken, it should be made consistent with the law concerning competence and compellability of spouses.

11.4.4 Recommendation

Abolish the privilege with respect to marital communications.

11.5 Corroboration

11.5.1 Introduction

Corroboration is a common law rule. The requirements for corroboration depend on the nature of the offence and the type of witness.[58] Under our system, a verdict cannot be based on the testimony of a single witness, especially if this witness does not have the required qualifications.[59] Children are included in this category of 'risk' witnesses. Children's unsworn testimony must be corroborated.[60] If a child is testifying under oath, the judge must warn the jury to be cautious in dealing with the testimony.[61] The basis for this rule is the mental immaturity of the child.[62]

The basis for requiring corroboration of a woman's evidence in sexual matters, however, is disclosed by these comments from the 1940 edition of Wigmore on Evidence:

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men ... (A) plausible tale by an attractive, innocent-looking girl may lead to a life-sentence for the accused, because the rules of Evidence (and the judge's unacquaintance with modern psychiatry) permit no adequate probing of the witness' veracity ... No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.[63]

The Criminal Code states that no person shall be convicted upon the unsworn testimony (of a child) unless the testimony is corroborated in a material particular by evidence that implicates the accused.[64] Thus, even if the trier of fact is satisfied beyond all reasonable doubt, he or she cannot find the accused guilty on the basis of unsworn testimony alone. Section 16(2) of the Canada Evidence Act states that no case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence. Corroboration so required by a rule entails specific evidence implicating the accused in some manner essential to the charge. It is a question not of confirming the credibility of the testimony, but rather of independent evidence.[65]

We should mention s. 246.4, which stipulates that corroboration is not required for certain offences; i.e., incest, gross indecency and sexual assault. Thus, s. 246.4 conclicts with s. 586. Does the former restrictive clause abolishing the rule take precedence over the latter, which is more general and requires corroboration? Does this mean that the testimony of a child of tender years who is the victim of sexual assualt would not have to be corroborated? Any recommendation will have to resolve this contradiction.

11.5.2 Analysis

The provisions of the Criminal Code and the Canada Evidence Act make it clear that children's testimony does not enjoy high standing and is not the subject of special consideration. Since it is believed that children are going to lie or exaggerate, or that they remember nothing and imagine everything, more demands are made of their testimony. It is interesting to note that these same arguments have been made with respect to sexual assault victims.[66] Corroboration has been maintained in Bill S-33, but the rule has been relaxed. In fact, s. 125 of the Bill states that no corroboration is required, that the court shall give instructions in any case in which it considers that an instruction is necessary,[67] and that directives on the need for caution shall be given with respect to unsworn testimony.[68] This represents an improvement in that conviction does not depend solely on corroboration. In a more drastic move, the Committee on Sexual Offences Against Children and Youth has proposed that s. 586 of the Criminal Code be repealed, and that s. 246.4 of the Criminal Code be applied to all sexual offences.[69]

In our view the basis for requiring corroboration of a woman's evidence in cases of sexual offence cases is entirely repugnant. As the rule requiring corroboration has already been abrogated with regard to sexual assaults it should be extended to the sexual offences not affected by Bill C-127.

11.5.3 Conclusion

Current law pertaining to corroboration of the unsworn testimony of children is unacceptable. It does not take into account the reality of the 'child victim' and it fails to recognize children's rights. Everyone agrees that changes are needed and that s. 586 of the Criminal Code and s. 16(2) of the Canada Evidence Act must be repealed. There is also agreement on the notion that a child's testimony can be sufficient grounds for conviction. Despite a suggestion that corroboration be abolished in these cases, most are of the opinion that the frailty of a child's testimony makes instructions on the need for caution necessary to avoid any miscarriage of justice.

11.5.4 Recommendations

1. The law should not require corroboration of the unsworn testimony of a child (or of a child who has not made a solemn affirmation);

2. Section 586 of the Criminal Code and s. 16(2) of the Canada Evidence Act should be repealed; and

3. Section 246.2 of the Criminal Code should be extended to apply to all sexual offences.

11.6 Sexual conduct

11.6.1 Introduction

Questions about the sexual conduct of the victim with persons other than the accused have been the subject of much commentary and still give rise to discussion.

Until 1976, common law governed the admissibility of evidence on sexual conduct. The days of fishing expeditions where everything was permissible, and any question about the victim's sexual activity with persons other than the accused was allowed, gave way in 1976 to a qualified prohibition, according to which questions could be asked about the victim's sexual history, but only under certain conditions.[70] The new s. 142 was designed to limit the accused person from cross-examining a victim of rape or indecent assault about her sexual activity with persons other than the accused, unless the accused gave reasonable notice of his intention. Before admitting such evidence, the judge was required to hold an *in camera* hearing to determine the relevance of the evidence and whether its exclusion would prevent a just determination of an issue of fact in the proceedings. Unfortunately, the court's interpretation of this provision left victims in a worse position than had been the case under common law. They became compellable witnesses, and the defence could produce countering evidence of the victim's sexual conduct with persons other than the accused.[71]

Because the interpretation by the courts was not in keeping with the stated objectives of the proposed legislation, and because of widespread criticism, Parliament introduced Bill C-127 to restructure sexual offences and modify the rules of evidence. These amendments resulted in the repeal of s. 142.[72] Section 246.2 states that evidence of the victim's sexual activity with persons other than the accused is admissible in only three cases:

(1) to rebut evidence adduced by the prosecution concerning the complainant's activity or absence thereof (s. 246.6(1)(a));

(2) to establish the identity of the person who has sexual contact with the complainant on the occasion set out in the charge (s. 246.6(1)(b)); and

(3) where the evidence concerns sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge and relates to the consent the accused alleges he believed was given by the complainant (s. 246(1)(c)).

The evidence may be admitted only if the judge is satisfied; after notice has been given to the prosecution and an in camera hearing in which the victim is not a compellable witness has been held; that it meets the requirements of the section.[73]

It is difficult to measure the impact of these changes since they were made such a short time ago. It is clear, however, that a more detailed study of the frequency with which the new provisions are used, and, more important, the interpretation given then by the courts, will prove valuable for making more informed assessment of these sections, suggesting adequate reforms, and ensuring a more specific response concerning the effect of these provisions on the number of complaints and, of course, the way the victim is treated.

11.6.2 Analysis

A number of analyses and examinations of this topic enable us to make the following points.[74] These new provisions offer new tests of relevance and procedure. The reason why the relevance of sexual activity was so openly criticized in the past is that such evidence was regularly used to infer that there was consent, or to attack and undermine the victim's credibility. With the introduction of these new provisions, sexual history is no longer linked to credibility. This is why the exception set out in s. 246(1)(b) appears to be acceptable: it deals with identity and not consent.[75] Section 246.6(1)(c) is more problematic, since it still carries the traditional view that because a woman is sexually active with a third person, she gives the accused reason to believe she has consented. According to Watt, this section will result in problems of interpretation.[76] Further, the meaning of the phrase 'on the same occasion' will give rise to a variety of opinions.[77]

Section 246.6(1)(a) does not appear to pose any problems since it concerns rebuttal of evidence adduced by the Crown.[78] However, if we look carefully at what this section says, we realize that it does not limit the accused person's right to cross-examine the complainant about her sexual activity with persons other than the accused, but only his right to produce evidence. If the courts continue to approach this type of offence as they have in the past, one can expect that these provisions will not offer as much protection as was intended.[79] Even if there were a rule stating that the victim can never be compelled to testify on this question, there would still be the possibility of judges interpreting it in favour of the accused.[80] A change in attitude and perception could give full force to the real aims of the legislation and offer greater protection for victims.

The improvements made with respect to the relevance test are cancelled out by the drop in protection in terms of the procedure. The notice of evidence to be adduced applies only to s. 246.6(1)(c) and refers to the evidence to be presented, not the questions that will be asked.[81] The fact that exclusion of the public is mandatory and gives the judge no discretion suggests the possibility of contravention of section 2(b) of the Canadian Charter of Rights and Freedoms.[82] With this in mind, the courts will have to weigh the reasonableness of this exclusion in terms of reducing the woman's embarrassment or trauma against this fundamental freedom set out in the Charter.[83]

The new legislation contains specific provisions on the inadmissibility of reputation evidence. Section 246.7 states that such evidence is not admissible for the purpose of challenging or supporting the credibility of the complainant.[84] Would reputation evidence be admissible on the question of consent? Under those circumstances, it would be subject to s. 246.6 and would be admissible only under s. 246.6(1)(a). Some authors hold the view that this section is redundant in light of the existence of s. 246.6.[85]

Case law on ss. 246.6 and 246.7 is rather sparse. In R. v. Bird & Peeples,[86] ss. 7 and 11(d) of the Charter were said to have been violated. The judge quashed the argument that the restrictions imposed by ss. 246.6 and 246.7 prevent the accused from presenting a full and complete case in his defence, on the grounds that the restrictions are of a procedural nature and are reasonable. As regards s. 1 of the Charter, the judge concluded that the interests of society demand that the crime be reported and that privacy be protected. It is interesting to note that the judge added that the victim has a right not to suffer the negative consequences resulting from disclosure of her sexual activity, and that this sexual conduct is of marginal relevance. Since this did not constitute restriction of a substantive right, the Charter was not contravened.[87]

It remains to be seen whether the courts will accept this interpretation or claim that eliminating all judicial discretion is unconstitutional since there cannot be an exclusionary rule denying judicial discretion and affecting the accused person's right to a full and complete defence.[88] In the United States, the constitutionality of these exclusionary rules has been upheld. In 1979, 45 American states adopted 'rape shield' laws designed to limit evidence of the victim's sexual history. The more permissive laws were criticized on the grounds that they excluded judicial discretion; the more restrictive statutes were also denounced: 'To sacrifice legitimate rights of the accused person on the altar of women's liberation.'[90]

Since women are seven times more likely than men to be the victim of sexual assault,[91] this section is of great concern to them. Why would sexual activity with a person other than the accused be relevant to the issue in the three situations allowed under the Code? Clearly, the notion of relevance does not have the same significance for women, and the main reason why there should be no questions about sexual activity is still that such activity is not relevant to the issue at hand. It appears that the intent of this provision was to achieve a just balance between the interests of the accused (his right to a full and complete defence) and protection of the victim from harassment. If the victim's sexual history had any probative value, questions about it would be justified, and the issue of harassment would not even arise. If the victim's credibility or the truth of her version depends on her chasteness, then consideration of her sexual activity is relevant. The divergence between women's perception of relevance and the court's perception of the same notion makes all the difference.

11.6.3 Conclusion

Without doubt, ss. 246.6 and 246.7 are a definite and long-awaited improvement of general cross-examination. Now, questions about sexual conduct are prohibited, except in three specific situations. However, the courts' interpretation of these provisions will tell us if they are an improvement over the former s. 142 and the Forsythe decision.

At first glance, s. 246.6 severely limits the number of situations likely to give rise to evidence of sexual conduct, and case law so far appears to respect the principle of non-harassment of victims and consideration for privacy. The fact remains, however, that these provisions are still new, and their development must be monitored. For this reason, our conclusions on their use and application are limited. We should point out that these provisions have not solved the basic problem, which is the relevance of sexual conduct. The logic used in admitting evidence of sexual activity was that it was a measure of credibility. The link between truth and sexual conduct explained the belief than an immoral or adulterous person would have absolutely no qualms about lying. As far as consent is concerned, determining relevance meant associating the past and the present. This type of - obviously faulty - reasoning is a clear sign of a poor understanding of human behaviour, but it explains how evidence of sexual conduct came to be admissible.

11.6.4 Recommendations

To begin, it would be interesting to carry out a study on the frequency of use of these provisions and their impact on verdicts (similar, for example, to the Nelson[92] study on jury decisions). Nelson concluded from his experimental study that this element does not influence a jury's decision. Second, a study on the application of these provisions and their interpretation by the courts would be very useful for formulating amendments. Third, it would be appropriate to evaluate the degree to which such legislation restricts the rights enshrined in the Charter. Finally, the notion of relevance should be examined with a view to proposing an absolute exclusionary rule on evidence of the complainant's sexual history.

PART IV

SENTENCING

12.0 General Introduction

As an introduction to this part of our review, we would like to make two points.

12.0.1 Female Crime - Extent, Trends and Society's Response

There is no doubt that female crime constitutes a very small percentage of the entire phenomenon of deviance, and that crimes committed by women are less dangerous than those committed by men. Penologists, sociologists, statisticians and the general public agree on these two points.

However, the agreement ends there. There is no consensus regarding trends in female crime and whether the problem is becoming worse. There is also open debate over society's response to female crime.

12.0.2 Lack of Statistics on Convictions in Canada Since 1973

The second point is a rather sad observation. Since 1973, no national records have been kept of criminal convictions and sentences in Canada. In 1973, Statistics Canada published the last edition of catalogue 85-201, which provided statistics, albeit incomplete ones, on criminal convictions and various characteristics of those convicted, such as age, sex, offence, province and sentence. In order to overcome this major deficiency, we will use the reports of the Ministry of the Solicitor General (particularly those of its Strategic Planning Committee[1] for prison sentences and parole), analyses of sentencing trends from 1960 to 1972,[2] and reports obtained from the Canadian Centre for Justice Statistics.

CHAPTER 12

MINIMUM AND NON-CUSTODIAL SENTENCES

12.1 Minimum Sentences

12.1.1 Introduction

A minimum sentence does not mean a short sentence. It is a fixed sentence, the minimal length of which is determined under the *Criminal Code*[3] and is beyond the jurisdiction of the courts. In two of the three offences for which minimum sentences are handed down under Canadian criminal statutes, the sanctions are extremely severe.

Under the *Criminal Code* and the *Narcotic Control Act*,[4] three crimes carry minimum or fixed sentences: murder,[5] the importation of narcotics[6] and operation of a motor vehicle while impaired by alcohol or drugs.[7] The minimum sentence concept is applied much differently for impaired driving than for the first two offences.

Minimum sentences for murder and importation of narcotics are very long, mandatory prison terms: twenty-five and ten years without parole for murder, and seven years without parole for importing narcotics. We will examine the specific effects of long prison sentences on women and the prevailing conditions in penitentiaries and prisons for women. We will also touch on medium-length prison sentences.

Driving a motor vehicle while impaired carries minimum sentences ranging from a minimum fine of $50 to imprisonment for six months for a first offence, imprisonment for between fourteen days and one year for a second offence, and imprisonment for between three months and two years for a third offence.

We will examine the effects of short prison terms for impaired driving in the section on prison sentences and those of fines in the section on non-custodial sentences. We would also like to critically examine the concept of minimum sentences in general and in terms of the offences in question.

12.1.2 Effects of Prison Sentences or Custodial Sentences on Women

12.1.2.1 Long Prison Sentences (7, 10 and 25 years)

Murder and the importation of narcotics carry minimum sentences of very long prison terms, which have significant repercussions on the female inmate population. Since few women receive prison sentences of more than two years, female inmates serving time for homicide and offences related to the importation of drugs are overrepresented in comparison with the male inmate population serving long sentences: 25% of all federal female inmates are serving sentences of seven years for importing narcotics, ten years for second degree murder or twenty-five years for first degree murder.[8]

Given these long mandatory prison sentences, a critical examination of prisons for women is warranted.

Two main threads run throughout the extensive literature on this subject. First, prisons for women are discriminatory because they do not offer the services and programs available to inmates in institutions for men. Second, since most female inmates are mothers, the obligatory separation from their children constitutes an additional cruel punishment.

Crisman,[9] Potter[10] and the US Comptroller General[11] criticize the disparities between prisons for men and those for women, particularly the lack of adequate services and educational and apprenticeship programs. Potter reports that female inmates are treated like inferiors and children in prison; they are offered traditionally female occupations, which lead to low-status, low-paying jobs. Sacks contends that penal institutions are a good example of systemic sexual discrimination. According to him, the lack of educational programs is all the more deplorable, since many inmates enter prison today with a formal education and work skills that could be perfected during imprisonment if sufficient resources were available, particularly in cases of long prison sentences.[12]

Sobel criticizes the lack of physical and mental health services in prisons for women. She feels that inmates have a great need for these services because they suffer considerable stress as a result of the separation from their family, their spouse and especially their children.[13] Anderson also deals with the emotional problems of incarcerated women who are separated from their children.[14] Fabian explains that women are treated in a paternalistic manner in prison because of sexist views of the female role. Women are considered to need 'reform' rather than training and supervision, as in the case of men.[15]

A number of the authors cited propose corrective measures, including the sharing of existing facilities and programs in prisons for men.[16] Fabian[17] and Sacks[18] suggest the establishment of co-educational prison systems. Smykla,[19] however, is very critical of such systems, contending that although studies have revealed that co-educational prisons prepare inmates for release much more effectively and reduce transition problems, it is not certain whether they actually discourage recidivism. Sobel emphasizes the importance of support services for the transition from prison to society, and shows that this transition is greatly facilitated when women have frequent contact with their children and spouses during imprisonment.[20]

In Canada, many critical studies have been conducted on the prison system for women, including those[21] of the Royal Commission on the Status of Women in Canada,[21] the Canadian Committee on Corrections[22] and the Canadian Association for the Prevention of Crime,[23] all of which underline the lack of adequate services and training programs in prisons for women. These reports also criticize the centralized nature of the criminal justice system for women and the additional suffering of female inmates who are deprived of contact with their family for long periods. This centralization has been partially corrected by the development of a policy of transferring female offenders serving federal sentences to provincial institutions. In addition, a day-care centre has been created on the premises of the Prison for Women in Kingston, and certain programs of the Kingston Penitentiary for men are starting to be offered to women.

Nevertheless, neither the inmates at the Prison for Women in Kingston nor the female inmates transferred to provincial institutions receive the equitable training, health and educational programs that are so badly needed. Several years ago, the Canadian Human Rights Commission, investigating a complaint filed by Women for Justice, found the Correctional Service of Canada guilty of discrimination against inmates at the Prison for Women in Kingston.[24] Francophone female inmates and inmates from eastern Canada serving sentences at the Tanguay Prison in Montreal reportedly have many complaints regarding their activity program and the lack of facilities for family visits.

12.1.2.2 Medium-length Prison Sentences

Although prison terms of two to seven years are not fixed sentences, we mention them in passing because the criticisms levelled against penitentiaries in which women serve long sentences are also relevant in the case of medium-length sentences. Observations on apprenticeship programs are directly applicable to medium-length prison sentences since the preparation for the return to society should be quick, effective and realistic.

12.1.2.3 Short Prison Sentences

Care must be taken in applying the same criticisms to prisons at which women serve short prison terms. The effects of the lack of apprenticeship and work programs on the future of female inmates imprisoned for less than one month are not very serious, if they exist at all. The same cannot be said, however, for the lack of educational programs, which would clearly be useful during a period of forced confinement and relative inactivity, followed by an immediate return to active life. In addition, the lack of adequate health services can have serious implications for pregnant women, even those serving short prison sentences.

The lack of organization for granting spousal or family visits has dramatic repercussions in that the family finds this shortcoming an easy excuse for breaking contact with the inmate. No woman serving a fixed prison sentence of seven, 10 or 25 years will ever be reunited with her husband or children. However, women serving minimum prison sentences of three months, for example, are able to maintain family ties, if care, adequate social services and well-organized discharges are provided.

Short sentences are served in provincial institutions, which often offer female offenders the unquestionable advantage of being located near home. However, provincial prisons offer even fewer services and programs than federal penitentiaries. The Tanguay Prison, where the majority of federal francophone female inmates serve their sentences, lacks the services that make imprisonment humanly tolerable and that prepare inmates for their return to society. The proportion of women in provincial institutions is not insignificant: there are 500 or 600 female inmates, accounting for 4% to 6% of the total prison population.[25] A large number of these women are serving fixed sentences.[26]

12.1.3 Conclusions

12.1.3.1 Critical Examination of the Concept of Minimum Sentences

We believe that it is completely justifiable to limit judicial discretion. The majority of today's criminal codes limit the courts' discretion by specifying maximum sentences, and minimum sentences are reserved for a few very serious crimes, for which the public strongly advocates supervision and punishment of the offender. It is clear that the general public, through the legislators, does not feel that an offender should go unpunished when the code stipulates a minimum sentence.

However, there is certainly no comparison between seven, 10 or 25 years of imprisonment and a minimum fine of $50, or even sentences of 14 days to three months of imprisonment. We shall discuss these two types of sentences separately.

A long fixed prison sentence has many adverse effects on the inmate's motivation to modify his or her behaviour and return to society. These sentences have such negative repercussions on the inmate population (which increases annually by the addition of new inmates whose date of release seems light years away from the time the crime was committed) that they should only be used when there is no alternative. Moreover, the type of criminal who receives these sentences should be homogeneous and equally dangerous. This is certainly not the case for murderers, especially female murderers: 73% of female murderers (compared with 35% of male murderers) commit their offence within domestic relationships, which are emotionally charged and very special relationships.[27] Recidivism is extremely rare in these cases.

So few criminals are sentenced for importing narcotics, and consequently the sentence is so arbitrary, that it appears unfair that those who are convicted automatically receive seven-year prison terms. In 1983, the Solicitor General himself stated that 90% of illicit trade eludes all police control.

Minimum sentences imposed for impaired driving are a completely different case. First of all, minimum sentences handed down for this offence are extremely light and depend on whether the violation was a first, second or third offence. Moreover, maximum sentences are useful because the minimum sentences are not too severe. Given this leeway, it is possible to take into account the seriousness of the offence and the situation of the offender.

Very severe minimum sentences are not consistent with this school of thought. For all practical purposes, they make maximum sentences useless or ridiculous. What maximum can be stipulated when the minimum sentence is 25 years of imprisonment?

12.1.3.2 Long Sentences and Federal Penal Institutions for Women

Unlike penitentiaries for men, institutions in which women serve long prison terms offer a sparse selection of programs and services to meet the inmates' health requirements, educational needs (which increase as the length of their prison term increases since they will one day return to a society in which the level of education is increasing) and need to earn wages. Consequently, they receive discriminatory treatment. Imprisonment is also more cruel for women than men because it ruptures family ties. The importance of family relationships for women is considerably different than for men because many more female inmates than male inmates have spouses and children.

Although some progress has been made at the Prison for Women in Kingston with respect to programs and facilities for family visits, the situation is far from ideal and is not even comparable to that in prisons for men. At the Tanguay Prison in Montreal, programs, health services and possibilities for family visits are lacking. Moreover, there are no day-care facilities near the Tanguay Prison.

12.1.3.3 Short Sentences and Provincial Penal Institutions for Women

A number of the shortcomings already discussed with respect to imprisonment also apply to minimum sentences of short prison terms. Inmates serving very short sentences are clearly not affected by the lack of apprenticeship programs and work areas, but there are other serious shortcomings that sometimes make the sentences discriminatory.[28]

12.1.4 Recommendations

If mandatory long prison terms are necessary, discrimination in prisons and penitentiaries for women must be eliminated by providing up-to-date educational and vocational training programs, day-care centres and facilities for family and spousal visits at these institutions. Sharing the resources available to prisons for men for programs and services would be one interesting approach. Finally, the development of services to facilitate the transition to society is essential for women who have been completely cut off from their social and professional lives for long periods and who, on leaving prison, will find themselves without their spouse or partner.

Men and women who commit murder in a 'business' context should be separated from those who murder within family or romantic relationships. The latter group should, after a short prison term, be promptly sent to community residential centres, and from there directed, under supervision, to training or work places, and assisted in re-establishing their family relationships or forming new ones. Fixed prison terms are certainly not justifiable for all cases of homicide. Community service orders are particularly appropriate sentences for battered women who murder their husbands in legitimate self-defence, and are conducive to re-adaptation if they are accompanied by psychological and social support and sometimes by stays in reception centres for female victims.

The research on homicide dispositions conducted by the Law Reform Commission of Canada provides for three categories of homicide. Only the first category - intentional homicide in the first degree - would henceforth carry a minimum and maximum sentence. It proposes that the other two categories - intentional homicide in the second degree and reckless homicide - should not carry fixed, or minimum, sentences over which the courts do not have jurisdiction. Only maximum sentences would be prescribed by law.[29]

12.2 Non-custodial Sentences

12.2.1 Introduction

Non-custodial sentences are sanctions that do not deprive offenders of their freedom of movement, and include fines, conditional discharge, community service orders, restitution and compensation orders, and probation. We will analyze the repercussions and the specific conditions of the application of these sentences in the case of women.

12.2.2 Effects of Non-custodial Sentences on Women

What non-custodial sentences have in common is that they do not remove the offender from his or her family or social environment. Given the importance that women generally attach to their personal relationships, these sentences have a considerable advantage over imprisonment. Nevertheless, they are not all equally suitable to the social and economic situations of convicted women.

We will divide these sentences into two categories: those that have financial implications and those that do not. Courts often impose both a fine and a sentence from the other category, such as probation.

There is nothing in scientific reports and professional literature on the repercussions of fines on convicted women. However, this is the sentence women receive most frequently. Bertrand shows that the proportion of women ordered to pay fines virtually doubled between 1960 and 1972.[30]

As a number of authors have stated, women in conflict with the criminal justice system are generally young mothers who are often faced with economic problems; they receive no support from the children's father, who has left them. Box and Hale point out that unemployment is high among women these days and that many are victims of a sort of economic marginalization because they are single parents and because of the economic crisis. These two authors are among the very few researchers who have dealt with women's economic problems and who have given some thought to their new criminal opportunities. Dismissing the theory that female crime is not increasing, they demonstrate that very recent factors could very well drive many women to commit crimes such as theft.[31]

12.2.3 Conclusions

We are pleased to observe that there was a trend in the courts to impose more non-custodial sentences on women between 1960 and 1973. Only partial data are available after 1973. Because studies on the effects of probation and the recently created community service orders are lacking, we have limited knowledge of the impact of these sentences. However, we are hopeful that the courts will establish rules for calculating fines and develop means for evaluating the income of women ordered to pay fines.

In view of two additional realities regarding women: their dual employment role inside and outside the home as well as their responsibility for caring for children. We are critical of sentences that frequently require offenders to travel considerable distances, with no provision for child care services either where they must report for probation or parole, or in the home. We are in no way suggesting that women should be deprived of the support of probation or parole, two very useful measures if properly applied. However, equity and equality demand that the specific situations of women, their role, and the constraints this role can place on their mobility and their ability to pay fines must be taken into account in handing down these sentences. The only study on women and parole that we were able to find states that the risk of recidivism increases significantly among women who are refused parole.[32]

12.2.4 Recommendations

Of the non-custodial sentences handed down to women, we believe that community service orders and vocational training programs are the fairest and most beneficial to both women and the community. These sanctions give these women, who often live in a limited domestic environment, exposure to broader realities, even in their immediate surroundings, and allow them to take apprenticeship programs leading to favourable employment prospects. Here again, child care services must be available. Because the imposition of these sentences on women is recent, we were unable to find any studies on their effectiveness.

The national statistics system on convictions and sentences should also be re-established and complemented by studies on the relative effectiveness of the sentences imposed. Data should be provided by sex for all stages of the sentencing process.

CHAPTER 13

EFFECTS OF DEFINING AS CRIMINAL OFFENCES WHICH CAUSE LITTLE HARM TO THE PUBLIC

13.1 Introduction

As stated in the introduction to this study,[1] the vast majority of offences for which women are charged cause little harm to others and to the community. These include non-violent petty theft, violations of provincial liquor acts and the Narcotic Control Act[2] (which prohibits the mere possession of marijuana) and other offences such as disturbing the peace and breaking bail (see Table 1 in the Appendix).

Nevertheless, women are convicted of and sentenced for these offences, since only a small number of them receive an absolute discharge. What are the effects of these brushes with the law, which very often result, in the case of women, from offences that should be decriminalized? Are these effects common to all offenders, or are they peculiar to women because of the nature of the sentences handed down or of their particular social situation? We will attempt to answer these questions in this chapter.

13.2 Economic, Social and Psychological Repercussions

Defining minor offences as criminal acts entails costs for the State, the community, the immediate family and the offenders themselves. These costs are primarily economic, social, psychological, emotional and moral in nature.

13.2.1 Analysis

The issue of the cost of crime to the State, and consequently, to the communities which financially support the services of the criminal justice system, is raised more and more often. However, the majority of authors do not directly address the effects of qualifying minor offences as criminal. Nevertheless, most female offenders commit minor offences and their social costs should be measured.

Although minor offences can carry prison terms, this sanction is not common. Nevertheless, a significant proportion of men and women convicted of minor offences do receive prison terms. In 1983, 9% of those charged with simple possession of narcotics were given prison terms.[3]

Since imprisonment is not the most common sentence for minor offences, we will not discuss its costs to the community or the offender in this chapter. In Chapter 12, we pointed out the principal criticisms of prison sentences, particularly for women. Detailed consideration should also be given to the cost of imprisonment to both the community and the offender.

In attempting to imagine the economic, social and psychological impact of criminalizing deviant acts, we must be equally interested in the effects on the offender him- or herself, on the State and on the community.

A number of authors have studied the economic repercussions of criminal convictions on the offenders. It is often difficult for them to draw a clear distinction between economic, social and psychological impacts. In their study on the social costs of crime, Landreville _et. al._ discuss in great detail the financial losses incurred by the accused during his trial (loss of days of work, loss of employment, negative effects on career and income), but they also deal with the impact of the charge, conviction _and_ financial losses on family relationships. They even touch on health problems caused by conflicts with the law.[4] For many ex-inmates, imprisonment has resulted in physical and mental problems, such as diseases of the digestive system, dependency on sleeping pills and tranquilizers, paranoia, depression, etc.

The effects of criminal convictions on employment, borrowing capacity, insurance etc. are examined by several authors. Bergeron discusses the lack of skills resulting from criminal convictions;[5] Boshier and Johnson study the reduction of employment opportunities;[6] Grenier deals with the general situation of ex-inmates in the work force;[7] Leon examines the consequences of being found guilty;[8] Lykke looks at the attitudes of finance and insurance companies;[9] and Melichercik and Portnoy discuss the general employment problems of anyone with a criminal record.[10]

At a more theoretical level, there is extensive criminological literature that deals specifically with the stigma attached to criminal charges and convictions. For some authors, Lemert in particular, secondary deviance and sometimes a life of crime are the most apparent results of repeated confinement within penal institutions.[11] Matza shares this opinion and even believes that police questioning is not without its consequences,[12] an opinion strongly supported by Schwartz and Skolnick.[13] However, none of these authors deals specifically with female offenders.

13.2.2 Conclusions

The effects of criminalizing minor offences can be analyzed from the viewpoint of either the dispenser of justice or the accused.

In the former case, studies have been conducted on the costs of administering the criminal justice system, policing services and para-penal resources, but few studies have been done on the specific costs of minor offences.

In respect to the accused, studies have shown the effect of criminal convictions on income, employment, borrowing capacity, insurability, family relationships and so on. However, none of the studies conducted from the point of view of the accused specifically examines the effects on women of treating minor offences as criminal acts. On the contrary, the most interesting studies, those of Landreville et al,[14] systematically ignore female offenders as if they simply did not exist. Moreover, they are sexist in their references to young women. We will deal with these biases in Chapter 15.

13.2.3 Recommendations

The Law Reform Commission of Canada has recommended that the sections of the Criminal Code concerning property rights be reviewed and that the obsolete, minor offences that clutter Canadian legislation be removed. The Commission's main argument in support of its recommendations is that the values of the Canadian public have changed and that criminal law will gain respect if it focusses on important matters. The Commission also raises the issue of the costs incurred by the proliferation of legislation and the obstruction of the courts.[15]

Steps must be taken to ensure that the debate on these important issues takes place and that all the necessary information is brought forth so that the Canadian public or its representatives may make an informed judgment of the effects of criminalizing minor offences. How much does it cost the State to prosecute and convict persons for offences such as shoplifting, and to administer the sentences that are believed necessary? Given the ineffectiveness and cost of these sanctions, alternative social responses are absolutely necessary.

We also recommend that in studies on the costs of crime to both society and the accused, the effects of petty offences be examined separately. Moreover, once the effects of being convicted of victimless crimes or minor violations are identified, we must convince the legislators and the Canadian public that this petty delinquency should no longer be dealt with under the criminal justice system, but by tribunals or other administrative mechanisms.

13.3 Trends and Disparities in the Sentencing of Women

13.3.1 Introduction

The effects of sentences on women convicted of minor offences may be different than those on men for three main reasons.

(1) The sentences given to women for a particular offence are not the same as those imposed on men for the same offence.

(2) Although similar, the sentences are not, and cannot be, experienced by women in the same way as they are experienced by men. This is because of women's role as wives and mothers and, in the case of fines, because of their income.

(3) There is a different social response to female crime.

In order to accurately describe the effects of sentences on women convicted of an offence, we must first determine what type of sentences they are given. Up to this point, we have used statistics on charges against women (see Table 1 in the Appendix) to give some idea of the nature of female crime.[16] Given the lack of recent statistics on convictions, it is not easy to analyze the sentences. Not only are there no statistics on convictions after 1972, but for summary conviction offences do not give a breakdown by sex. Male/female statistics are provided only for indictable offences.

However, a relatively large number of the minor offences we are taking into account in this study may be treated as either indictable offences or summary conviction offences. This is true of most of the offences stipulated in the Criminal Code and the Narcotic Control Act.

Although we are also interested in breaches of provincial and municipal statutes, we will examine sentencing trends from 1960 to 1972 for indictable offences in order to observe changes in sentences and to point out the differences in the sentencing of men and women.

13.3.1.1 Indictable Convictions from 1960 to 1972[17]

Table 2 outlines convictions from 1960 to 1972 (see the Appendix). There are obvious limitations to our examination of sentencing trends and of the differences in sentences according to sex, given the basis of the statistics provided in Table 2. 'Very light' sentences are not covered in our study and no data are available for after 1972. Nevertheless, Table 2 is significant. It shows that a greater proportion of women than men received fines from 1960 to 1972 and that the proportion grew during that time. In 1972, one out of every two women convicted was fined, compared with one out of every three men. Conversely, prison terms have decreased for women, dropping from 21.9% of all convictions in 1960 to 11.5% in 1972. The percentage of prison terms handed down to men remained virtually the same. The percentage of suspended sentences declined for both sexes from 1960 to 1972, and the percentage of men and women placed on probation increased.[18]

13.3.1.2 Convictions in 1978, 1979 and 1980

The second source of information we used to evaluate the sentences imposed on women was a partial report on convictions in 1978, 1979 and 1980. The Canadian Centre for Justice Statistics collated the reports of a number of judicial districts, representing certain regions of Canada. These data must be used with certain reservations, and the discrepancies arising from the samplying method must be taken into account.[19]

Table 3 provides the most recent data (see the Appendix), which include all violations under the Criminal Code and other federal statutes.

Appreciable differences exist between 1978 and 1979, and 1979 and 1980, in terms of fines and probation. These two sanctions are of particular interest to us, first because they are more frequently imposed on women, and second because they represent the most suitable response of the criminal justice system to minor offences.

The differences can perhaps be explained by the fact that the reports used to compile the estimates for 1978 and 1980 come almost entirely from Quebec and British Columbia, whereas those used for the 1979 are taken from all regions of Canada. However, the trends that emerge are so strong that we need not dwell on the differences. Fines and probation together account for more than 80% of all sentences given to women convicted under the Criminal Code or federal statutes in the three years in question. One out of every two women convicted was ordered to pay a fine, and one out of three was placed on probation. This trend was already apparent in 1972 (see Table 2).

Using the same sources,[20] we were able to determine the type of offences for which women were convicted in 1980.

13.3.1.3 Violations of the Criminal Code and Federal Statutes for which Women were Convicted in 1980

Table 4 illustrates the offences for which women were convicted in 1980 (see the Appendix). In general, their offences do not meet the criteria for incrimination according to the etymological sense of the term. If we focus on the actual 'crimes' stipulated in the main criminal legislation (the Criminal Code and federal statutes) we see that 80% of the major and serious crimes committed by women do not threaten public order or personal security in any way. However, driving a motor vehicle while impaired is considered a 'serious crime'.

Consequently, it was essential to examine infractions causing only minimum harm to others. If we add violations or provincial statutes and municipal by-laws by women to the breaches of the Criminal Code and federal statutes (40% of all charges: see Table 1), the picture is even less threatening.

13.3.2 Effects of Sentences and Criminal Records

13.3.2.1 Imprisonment

Despite arguments that prison terms should be eliminated out of hand as a sanction for minor offences, it is not at all certain that this is justifiable. In many countries, including Canada,[21] Australia,[22] Great Britain and the United States,[23] people conficted of minor offences are sentenced to prison.

We would like to add three comments to what we have already stated in Chapter 12 on prisons for women and the specific effects of imprisonment on women.

(1) The following testimony effectively conveys the depressing environment of provincial institutions, in which short prison terms are served.

> At the Gomin institution, we are bored (...). The inmates read, watch TV, talk, rock back and forth, sew, do the laundry and so on. There are no rehabilitation programs. The social worker spends her time listening to Beethoven in her office. Whenever there's a problem, they throw us in the hole.
>
> In the prison, the main activity is walking from the cells on the third floor down to the second, where the medication is taken.[24]

(2) Because of lack of community services for women with particular problems such as drug abuse, female offenders must sometimes be imprisoned to have access to treatment services which are available in the community for male offenders.[25]

(3) Society's response to female ex-inmates is such that the community services they require upon release cannot even be organized.[26]

13.3.2.2 Fines

Since no Canadian studies on fines - the sentence female offenders most commonly receive - it is impossible to evaluate the amount of the fines imposed, the offenders' ability to pay them or the effect of fines on offenders. However, very revealing research has been carried out concerning the imprisonment of male offenders who fail to pay fines. In view of the increasing use of this penalty and the low economic status of women, we believe that there are grounds for concern about this trend in the absence of rules for determining the amount of fines and alternative sentences. Two authors maintain that the sex of offenders has no effect on the amount of fines,[27] whereas a third claims that women are given less severe sentences as a result of their economic dependency.[28] In Canada, both statements are true. We believe that in order to ensure fairness, the difficult economic situation of women must be taken into account in fining them. In many cases, it is unfair to give women offenders the same fines given to male offenders.

13.3.2.3 Probation

We are happy to report that the percentage of women given probation is substantial and is greater than that of men. We believe that because the offences committed by women cause little harm, it is justifiable that female offenders account for 16%, and in some provinces 20%, of all offenders on probation.[29] However, as we pointed out in Chapter 12, no serious studies have been conducted on probation sentences for women, whereas detailed analyses have been carried out on the successes and failures of probation for men. Since women account for approximately 16% of the persons convicted of indictable offences, they are clearly overrepresented among offenders on probation. However, we believe that this is completely justifiable, given that their offences are generally not serious and that the probability of recidivism among those women who commit serious offences is low. The courts should impose this sentence more often for women.

13.3.2.4 Criminal Records

The effects of criminal conviction go beyond the sentences themselves. As we have just seen, sentences (particularly imprisonment) have secondary effects. Much more important than the sentences themselves is the weight of a criminal record. At 13.2.1, we cited a number of studies on the effect of criminal records on employment, family life, income and so on. However, an analysis that we have not yet discussed makes it possible to determine the effects of criminal records on women very specifically.

Hattem and Parent[30] report on the negative response of a number of very specific categories of employers to 'silent years' in curricula vitae, or on learning that a job applicant has a criminal record. The majority of positions mentioned are traditionally female occupations: domestics in private homes, cashiers in small and large stores, bank tellers and secretaries in the public service.

Although their study covers only male offenders, a number of sections are directly applicable to female offenders who have criminal records. Some positions, such as tellers in many banks, involve risks, and the employer must insure the employee or have the employee take out insurance. In order to do so, the employee must be insurable. The police, particularly the RCMP, perform checks to track down applicants with criminal records for bonding or insurance companies, and these applicants are automatically eliminated from such positions. In addition, a number of general insurance and finance companies close their doors to anyone with a criminal record.[31]

For women offenders, who generally have not completed their formal education and professional training and often do not have an extensive employment background, these additional difficulties constitute virtually insurmountable barriers to their integration into the work force.

13.3.3 Conclusions

Despite the lack of specific data on female offenders on probation, on the fines imposed on them or on the success or failure of these sanctions, two main conclusions can be drawn from the preceding analysis. First, fines account for a disturbingly large percentage (50%) of criminal sentences imposed on women, even though their economic situation is more difficult and more complicated than that of men. For female offenders, therefore, fines are often excessive and unfair. Similarly, on the basis of what we already know about criminal records, fines likely have devastating effects on women attempting to find or regain employment after a criminal conviction.

13.3.4 Recommendations

In view of the economic situation of women and their increasing marginalization in terms of income and employment, specific rules should be established regarding the fines that can be imposed on them. Moreover, the imprisonment of female offenders for failing to pay fines must be seriously examined.

In addition, the effects of criminal records on employment, income and family relations for female offenders must be analyzed, similar to studies conducted for male offenders. Finally, it is time that studies on probation included female offenders.

In order to prevent discrimination against women with criminal records, we recommend that all federal and provincial human rights legislation be amended to include 'possession of a criminal record' as a prohibited ground of discrimination.

CHAPTER 14

WOMEN AND SERIOUS OFFENCES

14.1 Introduction

We have seen that women commit few violent crimes against the person or against property. Just over 20% of the charges laid against women are for dangerous crimes, such as homicide, sexual assault, serious assaults, robbery or dangerous driving of a motor vehicle.

Three questions must be asked with respect to serious female crime. Is it increasing? How do society and the criminal justice system respond to offences against the person and public order? Is society's reaction based on the same principles and criteria that govern the deterrence of serious male crime?

14.2 Analysis

We have been concerned for close to 100 years with the possible increase in female crime, which some researchers feel will rapidly assume the same patterns as male crime. In 1893, Cesare Lombroso published The Female Offender in which he describes prostitution as the supreme crime of women. He also sees male characteristics in women who commit violent offences.[1]

More recently, in 1950, Pollak published his classic work, The Criminality of Women, a sort of compendium of everything known about female delinquency in the 1950s. In this book, Pollak advanced the hypothesis that the vast majority of offences committed by women remain unknown because of women's natural ability to lie or hide their actions.[2]

Since 1975, several female writers, whose work has created quite a stir, have become the proponents of Pollak's theory. According to them, female crime is rapidly increasing and is becoming more serious.[3] However, the majority of authors flatly deny that there has been an increase in violent crime by women,[4] and reject outright the hypothesis that the women's liberation movement has led to an upsurge and worsening of female crime. Some authors feel that if there has been an increase, it is in the number of non-violent offences against property,[5] and that female crime is not assuming the patterns of 'male' crime.

It is difficult to assess society's response to serious female crime accurately because of lack of qualitative and longitudinal studies. Such studies are long overdue. We can state, however, that over the past 20 years, the number of women who have received the most severe sentences (two or more years of imprisonment) has remained unchanged. The proportion of women has declined overall, and the grounds for imposing the higher sentences have changed. In 1982, 63% of women serving sentences in the Canadian penal system were convicted of crimes against the person, 13% were serving sentences for serious crimes against property, and 10% were convicted of violations of the Narcotic Control Act. In 1971, the figures were 25%, 27% and 17%, respectively.[6]

Women's prison terms were at least as long in 1982 as they were in 1971. In 1982, 43% of female federal inmates were serving sentences of over six years compared with 39% in 1971.[7]

Although at first glance the offences for which women were given prison sentences in 1981 appear to be more serious than those for which convictions were made in 1971, we believe that the majority of the crimes committed did not warrant long prison sentences, and that recidivism among female criminals is highly unlikely in the majority of offences against the person. We also believe that the sentences imposed are too long, and can result in the complete desocialization of female inmates.

A number of authors believe that women receive less severe sentences than men for the same crime. This is the 'preferential treatment' or 'chivalry' theory advanced by Crites,[8] Moulds,[9] Steffensmeier[10] and Thomson et al.[11] In a recent article, however, Steffensmeier[12] contends that sentencing disparities between men and women are decreasing.

Several authors have studied the disparities in sentencing according to the sex of those accused of serious crimes. Farrell[13] and Bertrand[14] believe that female murderers receive less severe sentences than male murderers, but do not feel that the more lenient sentences are justified by the offender's sex. Other social, economic and criminological variables enter into play, such as the presence of young children, the lack of a past criminal record and the secondary role played by the woman in the commission of offences. Farrell[15] has observed that women who murder men are given lighter sentences than men who murder women. In their studies on the death penalty, Fortenberry[16] and Chamblin[17] conclude that the offender's sex is not a factor in the decision to impose the death penalty.

There is a debate over the principles that govern the response of the criminal justice system to female crime. The majority of authors share the opinion that it is the actual seriousness of the crimes committed by women, and particularly women's role in crimes, that lead judges and juries to impose the sentences they do on women convicted of serious crimes.[18]

14.3 Conclusions

As many authors have observed, violent female crime may be increasing slightly, but this phenomenon has not reached the drastic proportions reported by some researchers, particularly Adler[19] and Simon.[20] Society's response to violent female crime has remained unchanged over the past 20 years, as has the number of prison terms being served in federal institutions. Although some serious crimes committed by women are punished with considerable leniency by the courts, we believe that this is entirely justifiable if the circumstances and motives of these crimes and the unlikelihood of recidivism are taken into account. Murders committed within the family or with romantic relationships are isolated and circumstantial incidents, and the murderers do not repeat their crime. Men who commit murder under similar circumstances also receive reduced sentences. Society's response to violent crime against property is generally severe. Female offenders convicted of robbery are usually given the same sentences as men, and female accomplices are given relatively severe sentences.

14.4 Recommendations

Our findings with respect to fixed minimum prison sentences apply to all cases in which women convicted of serious criminal offences are given long prison terms. For female offenders, imprisonment also involves separation from children and spouses. Moreover, the risk of losing their families is high. In addition, prisons do not offer women the necessary services and programs, they are often unstimulating environments, and they are not conducive to the reintegration of the inmates into society. Prisons for women are therefore discriminatory compared with prisons for men.

However, a feminist vision of criminal law and sentences is completely incompatible with proposals to accord women privileged and paternalistic treatment. It is not a question of sparing offenders the penal consequences of their crimes because they are women and mothers. More lenient treatment accorded for the wrong reasons becomes preferential treatment and can only make the women given such treatment weaker and more irresponsible.

Women offenders must be given fair and equitable penalties for the right reasons, such as deterring offenders from repeating a crime in the future, righting the wrongs committed to society and some of its members and reminding the community of the values that its seeks to protect.

CHAPTER 15

EFFECTS OF SEXISM ON SENTENCING

15.1 Introduction

By 'prejudice' we mean a belief or preconceived opinion, often imposed by the environment, times or education. It is also a bias.[1] In this sense of the word, the meaning of 'prejudice' is very close to and even synonymous with the word 'stereotype': a fixed or conventional idea. 'Sexist' is used in everyday language to mean the discriminatory attitude toward women. It is synonymous with 'male chauvinist'.[2] In order to avoid confusion, we will restrict ourselves to the current usage of these terms. However, we believe that the dictionary definition for the word 'sexist' limits its actual meaning.

The world of criminal justice is a man's world. Until very recently, police officers, lawyers, judges, employees of penal institutions (with the exception, perhaps, of a few institutions for women and girls), bureaucrats and politicians responsible for the administration and direction of the criminal justice system were all men. There are undoubtedly many other examples of social systems dominated by men.

In the work force, male executives have considerable power over female employees. What differentiates it, however, from the power of police officers, judges, lawyers and administrators of penal institutions is that the latter have the right to decide the life or death of women in conflict with the criminal justice system. What is life if one has to spend 25, or even 10 years, in detention in a federal institution? What is life without children, a spouse, a social environment, employment; or a reputation, or rather, with a bad reputation that haunts the person forever?

By the preceding remarks, we do not mean to say that all prison sentences are unwarranted. Our description of the effects of a criminal conviction is meant to serve as a reminder that the power of the men who run the criminal justice system is greater than that of other men playing important role in society. Arrest, conviction and imprisonment are, to varying degrees, atrocities and forms of civil death. The power of people who can deprive their fellow citizens of freedom and honour is the most formidable of all powers.

15.2 Analysis of Studies and Data

Many authors have studied the sources, manifestations and effects of sexism on the accused, victims and female employees of the criminal justice system, and have proposed measures to change the situation. We will examine the studies and facts they have brought to our attention.

15.2.1 Sexism in the Courts: Judges, Lawyers and Jurors

A number of authors have addressed, in rather general terms, the question of stereotypes prevalent in the courts. Rafter and Natalizia,[3] for example, see the legal apparatus of capitalist societies as a formidable means of oppressing women through paternalistic attitudes. These attitudes doom to total failure the efforts to solve women's problems. According to Rafter and Natalizia, the types of victimization experienced almost exclusively by women are rooted in a patriarchal model in which women are sexual objects who can be raped, involved in incestuous relationships, beaten, sexually harassed at work and led to prostitution. They add that an egalitarian system would clearly provide better support for the victims of crime and would challenge the assumptions supporting the nuclear family. If delinquent women commit minor offences against property or crimes which run counter to the traditional concept of the female role, it is because crime is the only route open to them.

Although it is believed that women receive better treatment, or in any case, more lenient treatment than men under the criminal justice system, there is irrefutable evidence that this chivalrous treatment is given only to women from affluent backgrounds, who are seldom in conflict with the law. Sentencing practices are very discriminatory toward both young girls and women. Rafter and Natalizia feel that the concept of rehabilitation is based on a class system and is sexist and paternalistic. Prisons oppress female inmates, encourage them to be passive and enforce female sex role stereotypes.

Five authors examine the 'chivalry' theory. According to one of them, chivalrous attitudes give rise to special and preferential treatment toward women such as clemancy by the court, which is not accorded to men for similar crimes. Four of the authors[4] flatly deny that women are given preferential treatment by the courts: lawyers, judges or jurors. However, they all point out that the criminal justice system is characterized in many instances by paternalistic attitudes toward women. In a study conducted in Alabama and cited by Crites,[5] judges themselves admitted that their decisions were influenced by the traditional belief that the female role of wife and mother commands special treatment. However, the same judges also stated that if the sentences they hand down to women were often less severe than those handed down to men, it was because women played a secondary role in many crimes.

Chesney-Lind[6] and Scutt[7] feel that rather than receiving more lenient treatment, women are treated more harshly when they stray from their traditional role. The fifth author, Moulds,[8] holds that chivalrous attitudes and paternalism reign supreme in the courts, which seek to protect women both from themselves and from outside threats at all costs. There are two exceptions to this general rule of clemency. First, in some States of the United States, women can be given indeterminate sentences for an offence, whereas men are subject to short determinate sentences for the same offence. The second area in which the criminal justice system is more severe toward females is in cases involving young women, who are always treated more severely than young men.

Using Black's theory on the behaviour of law,[9] Kruttschnitt examines two very interesting factors that affect sentencing of female offenders: respectability and social status. In one study, she shows that, although prior criminal records are viewed as a universal indicator of the severity of dispositions imposed on male offenders, the same is not true for women. It is the non-legal signs of respectability that affect the sanctions handed down to female offenders. Past psychiatric treatment, drug use and abuse, employers' opinions and deviant acts committed in the company of peers all influence judges' decisions. The study concludes that, regardless of the offence committed, the less respectability a woman has, the greater the probability that she will receive a harsh sentence. In another article, Kruttschnitt shows that women's social characteristics (economic rank, age, and employment status, to name a few) play a role in sentencing, but that social integration and stratification are greater factors in criminal court decisions.[10]

Hewitt[11] and Popiel[12] feel that the analysis of factors leading to sentencing decisions is extremely complex. The judge's discretionary power does not reflect the true factors that ultimately affect sentencing. An additional factor that complicates the situation is that fewer women than men have prior criminal records or have been convicted of crimes involving the use of weapons. Thus, the multivariate analysis of extra-legal factors in judicial sentencing is not an easy task. Popiel[13] contends that judges' decisions can perhaps be analyzed, but that we will never really know how the court, jury or judge decides on a particular sentence. She suggests that only by limiting the discretionary power of judges and parole boards would it really be possible to enforce the clause regarding the right to equal protection of the law.

These conclusions can be drawn:

(1) 'Contrary to common assertion by lawyers, the law and the judges did not stand on the side of equality and individual rights, nor were they even neutral. By and large, they acted as barriers to, rather than a guarantee of, equality between men and women';

(2) This is the case both in the U.S. and in England. 'It made no difference whether the judges were operating in the context of the British system which enshrines the supremacy of Parliament, or whether they functioned in terms of the American Constitution guaranteeing individual rights'... 'they jointly upheld and justified the exclusion of women from the franchise right until the end of the second decade of this century'; and

(3) the legal profession did not come to the defense of individual rights treatened by State powers; 'The legal profession both supported discriminatory laws and practices in society at large, and upheld discrimination in its own ranks' (...)' 'To this day, the profession tends to manifest a grudging and uncomfortable tolerance rather than a facilitative welcome to women entrants'.

Wikler concludes that judges tend to enforce female sex role stereotypes. Judges embrace traditional values and beliefs regarding male and female sex roles, and prefer traditional institutions and familiar roles. The author also reports on the sexist treatment accorded to female victims in the courts, and contends that the legal system protects the rapist and mistrusts the female victim. Wikler concludes that legislative reform must include the entry of women into the legal profession and the systematic education of judges on a formal and informal basis.

A number of studies address the prejudices and sexist attitudes of juries and lawyers. Cohen and Peterson[16] have studied the effects of attorneys' race and sex on juror verdicts. They report that defendants represented by black attorneys are more likely to be found guilty than defendants represented by white attorneys. The effect of the prosecuting attorney's sex, however, is insignificant. In another study, Lindner and Ryder[17] show that the views of male attorneys with respect to female offenders and their behaviour are not shared by jurors, but accurately reflect those of the general public. According to these authors, jurors have, or develop in the course of their duties, more egalitarian, less sexist views than the public as a whole. Counsel is inclined to share the sex role stereotypes of the average man, and their biases are reflected in their pleading.

A number of studies have also been conducted on jury selection and the biases that are introduced by lawyers' stereotypes of women and of their participation in this process.[18] The resistance in the United States to selecting mixed juries lies in obvious male stereotypes. Even if women were chosen, they would find a way to shirk jury duty; they are not capable of rendering sound verdicts; they are too soft-hearted; they are too easily influenced; and they are less likely to convict an accused.[19] They are too submissive; counsel feels they are handicapped in returning verdicts because they are emotional, dependent and jealous.[20] All, or almost all the authors cited, however, recognize that until juries are equally mixed and until women have access to the position of jury foreman, justice will be poorly administered to both men and women, since those who dispense it have only a part of human wisdom and culture, that development by men.

15.2.2 The Double Standard for Young Female Offenders

We studied 14 articles that address the discriminatory treatment accorded to young women by the criminal justice system.[21] The authors of these articles all agree on several essential points: young women are brought to youth court 'for their protection', often without having committed an offence; they are more frequently detained in custody before trials than young men; they are given longer custody sentences than young men; runaway girls are almost always suspected of having sexual relations; and they are judged incorrigible, since they presumably do not have high moral values. Parents do not tolerate behaviour from their daughters that stray from traditional sex roles, and bring them before the courts if they defy parental authority. One of the authors concludes that this discrimination is so extreme that adults who can modify this situation must help young women develop their resistance to such a system of injustice.[22]

In Canada, the new Young Offenders Act[23] does not provide for these 'status crimes' as did its predecessor, the Juvenile Delinquents Act of 1908.[24] Under the old law, minors could be detained for their incorrigibility and 'immoral sexual conduct'. This provision was applied discriminatorily to young women. For example, young men were rarely arrested for immoral sexual conduct, but young women brought to the youth courts for this reason were often given long sentences in institutions.[25]

We would like to believe that this source of inequity - the provisions on immorality and incorrigibility - has been effectively halted by the new federal legislation on young offenders. However, as observers and the legislators themselves have remarked, the provinces are entirely free to complement the new Young Offenders Act with their own legislation on youth protection. Each Canadian province already has statutes which operate to 'protect' young women to a much greater extent than young men. They are used to deal with female runaways (girls who come in too late, do not come home at all or spend the night at their boyfriend's house) 'gently' but 'at great length' (indeterminate sanctions). There is nothing that leads us to believe that this differential and paternalistic treatment will cease. In 1985, the records of reception centres in a number of provinces list running away or immoral sexual conduct as the reasons for placement of young girls. However, these provinces maintain that they have been applying the new Young Offenders Act since 1982.

Another form of discrimination against young women is that they are frequently required to undergo complete gynecological examinations when detained in custody before a trial, with the official intention of detecting venereal diseases and the unofficial intention of verifying their virginity. The practice of subjecting young women to gynecological examinations has a long and disgraceful history, because the government-employed physicians assigned to the centres where minors are detained before trial are often male, very old, indelicate and incompetent.

Three of the American articles we examined dealt with racial discrimination, and the authors' analyses appear to us to be entirely applicable to the situation of native women.[26] Two of the authors, Adams and Foley, content that black female prisoners are given longer prison terms than their white counterparts. According to Foley et. al., this can be explained in part by the fact that black female offenders have longer criminal records that white female offenders. However, Adams[27] warns us against this data. Victimization studies show that the general population does not complain about being attacked by blacks in the same proportion that the police of Washington, D.C., arrests black suspects. The author concludes that this and other information in his study establish that the criminal justice system of Washington, D.C., is characterized by racial biases. Finally, French[28] shows that the demographic breakdown and the racial breakdown of inmates in the correctional system are inversely proportional. This inverse relationship is significant in the case of women, but not as pronounced in the case of men. Black women have particularly poor employment records and completely inadequate education.

In reading the literature available from the Ministry of the Solicitor General of Canada, we found that these findings are very similar to the situation of native women in the criminal justice system in Canada. Native women offenders are overrepresented in prison and there is a greater proportion of native women offenders than native male offenders. They serve long sentences and are not paroled before mandatory parole. This is also the conclusion of LaPrairie in a very recent article on native women prisoners.[29]

15.2.3 Stereotypes in Prison

A number of authors have studied discrimination in prisons and the stereotypes that affect female inmates.[30] These articles express the observations and criticisms that we made regarding prisons in the chapter on minimum sentences, but they also discuss other factors that make prisons for women even more discriminatory. Feinman[31] shows that even female prison administrators have many prejudices against female inmates. They perpetuate sex role stereotypes in the inmates, by encouraging childish behaviour and dependency by means of authoritative and sometimes sadistic attitudes; by promoting programs containing traditionally female activities, and by restricting the inmates to that type of work (maintenance, cooking, and so on) when they impose administrative sanctions on them. Haft[32] maintains that women serve longer prison sentences. In institutions for young women, the rigid programs and expectations developed are directly related to traditionally female roles. All the authors recommend that the double standards rampant in the criminal justice system be eliminated.

15.2.4 Proposals for Corrective Action

There is considerable literature on the employees of the criminal justice system, including secretaries, clerks, police officers, prison guards, matrons, senior administrators and judges. The general conclusion is that women must have access to employment at all levels in the penal and correctional systems. The barriers preventing women from becoming judges, jury foremen, jurors, defence and prosecuting counsel, institution wardens (even of institutions for men), police officers and security officers must be removed. All of the authors recognize that it is only through the gradual entry of a sufficient number of women into the legal system that many of the biases and sources of discrimination will disappear.[33]

The two last articles that we will analyze deal with another type of corrective measure. In the first, Popiel criticizes the discretionary power of judges and parole boards and states that this power must be limited. Mechanisms must be developed to review the sentences and related decisions, and the factors that can be taken into account in sentencing must be limited. To this end, we must agree to re-examine the famous rehabilitation model. Judges and parole boards must be prevented from scrutinizing all aspects of the offender's history and personality. Review procedures for sentences and parole board decisions, limitations on judicial discretion, and guidelines providing more coherence to these decisions would all be considerable improvements to the current discriminatory system of individualized sentencing. In the second article, Wright and Wright[34] arrive at exactly the same conclusions: models and guidelines must be proposed favouring more uniform sentencing of male and female offenders.

15.3 Conclusion

The abundance of literature and studies on the sexism that perpetuates considerable sentencing disparities in the criminal justice system shows that this issue is important and must be addressed immediately. Although a few authors continue to claim that women are given lenient treatment under the criminal justice system, the vast majority of authors agree that factors other than the judge's leniency toward women play a part in this differential sentencing. It is a fact that women commit fewer crimes than men and that they have shorter criminal records. It is also true that factors outside their situation of defendant come into play in sentencing and that the effect of these factors must be reduced.

15.4 Recommendations

There is no doubt that one way of eliminating biases and sexism from the criminal justice system and making it more equitable toward women would be to develop an affirmative action program covering all positions in this system, especially the most important and the most influential ones. In this way, the justice system will no longer be a man's world. Everyone who works in the criminal justice system must be informed of the inequities and discriminatory practices that continue to affect delinquent girls and female offenders. There is no doubt that the new Young Offenders Act will provide for status crimes to a lesser extent. However, we suspect that the provinces will use their youth protection statutes to force young women to observe chastity and the behaviour that parents, educators, judges and probation officers wish to impose on them.

We did not discuss the fate of female victims of criminal acts under the criminal justice system in detail. However, a few authors attempt to show that female victims are often treated as liars and women with low moral values. They are not given the benefit of the doubt, and although investigations into past sexual activities in the case of sexual assault are now prohibited,[35] the system is suspicious of female victims and believes that they deserve what happens to them. A number of authors observed that this is always the case in many Canadian and American courts. Here again, initiatives to promote information, education and awareness are essential. However, it is through the increase in the number of female lawyers, psychologists and advisors to the court that this unfair stereotyping will end.

TABLE 1

OFFENCES FOR WHICH WOMEN WERE CHARGED IN CANADA IN 1972 AND 1982, BY CATEGORY OF OFFENCE IN PERCENTAGES

Category of Offence	1972	1982
Violent offences against the person	3.9	4.0
Violent offences against property	1.6	1.9
Non-violent offences against property	28.7	31.0
Offences against public morals	3.4	4.5
Others, Criminal Code	9.5	14.1
Against federal statutes	6.1	4.5
Against provincial statutes	22.8	21.1
Against municipal by-laws	7.7	4.0
Traffic offences:		
Federal statutes	7.7	14.9
Provincial statutes	8.6	-
	100.0	100.0

Source: Statistics Canada, Catalogue 85-205, 1972 and 1982.

TABLE 3

SENTENCES OF WOMEN CONVICTED IN SOME CANADIAN COURTS IN 1978, 1979, 1980 IN PERCENTAGES (Criminal Code and Federal Statutes)

	1978	1979	1980	
Undeclared	0.3	0.4	0.1	
Probation	29.2	34.4	31.6	
Fine	57.7	48.4	54.6	
Institution -up to 6 months	11.7	13.9	12.7	
Institution -6 to 24 months	0.7	2.3	0.6	
Institution -2 to 5 years	0.4	0.5	0.2	
Institution -5 to 10 years	0	0	0	(4 cases)
Institution -life	0	0	0	(2 cases)
	100.0	100.0	99.8	

Source: Note 18 Statistics Canada, Canadian Centre for Justice Statistics, Tables: Types of sentences per province, women, 1978, 1979, 1980

TABLE 2

SENTENCES IMPOSED ON WOMEN AND MEN FOR INDICTABLE OFFENCES IN CANADA FROM 1960 TO 1972

Sentences imposed on men for indictable offences in Canada from 1960-1972

Sentences imposed on women for indictable offences in Canada from 1960-1972

	Suspended sentence	Suspended sentence and probation	Fine	Prison	Correctional institution	Training school	Penitentiary	Capital punishment	Extra sentence	TOTAL		Suspended sentence	Suspended sentence and probation	Fine	Prison	Correctional institution	Training school	Penitentiary	Capital punishment	Extra sentence	TOTAL
1960	3788 **11,5	5336 16	6910 21	11 939 36	1823 5,5	217 ,6	2868 9	10 ,03	603 2	32 891	1960	570 **22,3	484 19,0	793 31,1	558 21,9	70 2,7	15 ,59	62 2,4	-	28	2552
1961	3856 11	5932 17	7461 21	13 249 37	1764 5	206 ,5	3016 8	12 ,03	973 3	35 516	1961	626 19,8	609 19,3	1027 32,5	744 23,5	80 2,5	14 ,44	63 2	-	65	3163
1962	4009 11	6151 17	7404 21	12 850 36	1632 4,5	197 ,5	3257 9	13 ,03	915 2,5	35 513	1962	656 20,8	638 20,3	1099 34,9	591 18,8	83 2,6	5 ,16	78 2,5	-	39	3150
1963	4130 10,5	6952 18	8753 22	14 013 36	1667 4	278 ,7	3374 9	11 ,02	1273 3	39 178	1963	724 19,4	746 20	1345 36	722 19,3	110 2,9	22 ,59	67 1,8	-	68	3736
1964	4025 11	7040 18	8526 22	13 133 35	1713 4,5	250 ,7	3235 8,5	5 ,01	1281 3	37 927	1964	878 21,1	787 18,9	1598 38,3	724 17,4	94 2,3	15 ,36	74 1,77	-	83	4170
1965	3489 9	7285 20	8949 24	12 371 33	1574 4	216 ,6	3079 8	19 ,05	1478 4	36 992	1965	829 17,1	998 20,6	2096 43,3	726 8,8	92 1,9	19 ,39	80 1,65	-	100	4840
1966	4560 11	7537 19	10215 22,5	12 742 32	1736 4	293 ,7	2849 7	9 ,02	1581 4	39 941	1966	1169 20,4	1001 17,5	2563 44,7	808 14,1	119 2,08	15 ,26	54 ,94	-	203	5729
1967	4709 12	7490 19	9920 25	12 862 32	1736 4	261 ,6	2902 7	7 ,01	1487 4	39 887	1967	1100 18,9	1087 18,7	2716 46,7	706 12,1	102 1,8	26 ,45	79 1,4	-	145	5816
1968*	3820 11	6040 18	8350 25	11 199 33	1918 6	13 0	2360 7	1 0	1081 3	33 701	1968*	1040 21,2	807 16,4	2208 45,0	676 13,8	116 2,4	5 ,10	56 1,1	-	93	4908
1969	2963 9	7146 22	8504 26	10 304 31	1815 5,5	14 0	2204 7	- -	1313 4	32 950	1969	927 18,3	1070 21,1	2318 45,7	612 12,1	91 1,8	-	49 ,97	-	123	5067
1970	2711 7	9599 25	10910 28	11 485 29	2089 5	10 0	2076 5	3 0	1542 4	38 883	1970	848 12,1	1691 24,2	3577 51,1	694 9,9	141 2,0	1 6,01	45 ,64	-	168	6997
1971	2500 6	10008 25	11531 29	12 764 32	1332 3	2 0	2002 5	- -	1998 5	40 139	1971	870 11,2	1771 22,9	4103 53,0	844 ,9	112 1,4	-	35 ,45	-	218	7735
1972	2526 6,5	9441 25	11557 30	12 180 32	884 2	4 0	1738 4,5	1 0	1643 4	38 331	1972	923 12,7	1706 23,4	3605 49,5	836 11,5	150 2,1	3 ,04	60 ,82	-	215	7283

* From 1968, Quebec and Alberta are excluded

** Percentage of men

** Percentage of women

Source: Statistics Canada, Statistics of criminal and other offences, Catalogue 85-201.

Adapted by Bertrand, M.A., Recension des écrits sur la pathologisation des comportements féminins et la victimisation des femmes. 1984 Research report, University of Montreal, School of Criminology, p.79.

TABLE 4

VIOLATIONS OF THE CRIMINAL CODE AND FEDERAL STATUTES FOR WHICH WOMEN WERE CONVICTED IN CANADA IN 1980 IN PERCENTAGES (partial statistics)

Offences		%	
Non-violent offences against property			
theft		38.6	
possession of stolen property		1.7	
forgery and fraud		15.0	
	subtotal		55.3
Driving offences			
driving while impaired		7.5	
more than 80mg of alcohol in blood		9.0	
other		3.9	
	subtotal		20.4
Violent offences against the person and property			
homicide, attempted murder and criminal negligence		0 (4 cases)	
assault		2.7	
offensive weapons		0.4	
robbery		0.1	
break and enter		1.3	
mischief		1.5	
	subtotal		6.0
Drugs			
possession of narcotics		3.1	
other		1.1	
	subtotal		2.7
Sexual offences			
public morals and disorderly conduct		2.7	
	subtotal		2.7
Other			
failure to comply with probation order		1.1	
failure to appear		1.8	
conspiracy attempts		0.6	
corruption and deception		1.9	
other, *Criminal Code*		1.7	
other, federal statutes		4.4	
	subtotal		11.5
Total			100.1

Source: Note 18, Statistics Canada, Canadian Centre for Justice Statistics, Reports on convictions and sentences in a number of judicial districts of British Columbia and Quebec, 1980.

REFERENCES

Foreword

1. As Frances Olsen has pointed out, some feminists have argued that 'law is fundamentally patriarchal' and that resolution 'conflict through appeal to legal rights is a limited masculine approach.' She suggests, however, that law is a 'complex social practice and some gains have been and will continue to be achieved in the legal arena.' See *Statutory Rape: A Feminist Critique of Rights Analysis* (1984) 63 Texas L.R. 387, 400-401.

2. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (1983) 8 Signs 635, 644.

3. Prof. Jill McCalla Vickers discusses the 'rebellion against decontextualisation' across inter-disciplinary lines in 'Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research', in Miles and Finn (eds.) *Feminism in Canada* (1983).
   A legal example can be found in the discussion of self-defence, at chapter 4.4.1, *infra*.

4. See also Clark, 'Privacy, Property, Freedom and the Family', in Bronaugh (ed.) *Philosophical Law: Equality, Adjudication, Privacy*, (1978) at 167 *et seq*.
   McIntosh, *Review Symposium: Women, Crime and Criminology* (1977) 17 British J. of Criminology 395.
   Stang Dahl, Towe and Snare, 'The Coercion of Privacy: A Feminist Perspective' in Smart and Smart (eds.), *Women, Sexuality and Social Control* (1978).

Chapter 1

1. *Implications of Feminist Theory for the Direction of Reform of the Criminal Code* (1984) (a paper prepared for Mr. Justice Allen Linden, President of The Law Reform Commission of Canada).

2. *E.g.* the wife's defence of coercion is now gender-neutral in s. 18, of the *Criminal Code*, R.S.C. 1970, c. C-34, am. 1980-81-82, c. 125, s. 4 as is s. 197(1)(b) relating to a spouse's duty to provide necessaries for a spouse, am. 1974-75-76, c. 66 s. 8(1). All references to sections from now on are references to the present *Criminal Code*, unless other wise stated.

3. See Miles 'Introduction' in Miles and Finn (eds.), *Feminism in Canada* (1983).

(Chapter 1 cont'd)

4. Prof. Lahey also identifies a form of critical feminism which 'starts out with the assumption... that all women are free, and that the only barrier to the realization of that freedom is the pervasive influence of sex role stereotypes.' Such feminists aim for an androgynous ideal, rejecting dichotomous genderisation. See Lahey, supra, note 1, 46-47. Of course there are various ways of classifying the different feminisms, including socialist-feminism and radical feminism.

5. Black, The Behavior of the Law (1976);
Hulsman and Bernat de Celis, Peines perdues: le systémé pénal en question (1982);
Miaille, Le droit-violence (1980) 4 Déviance et Société 167.

6. Beccaria, Des délits et des peines (Dei deletti e delle pene) (1965) (first published in 1764).

7. Mill, 'On Liberty,' in Lerner (ed.), Essential Works of John Stuart Mill, (1965), 253-360.

8. Montesquieu, De l'esprit des lois (1961) (first published in 1748)), 2 volumes.

9. Allen, The Borderline of Criminal Justice: Essays in Law and Criminology (1964).

10. Fuller, The Morality of Law (1964).

11. Hart, Law, Liberty and Morality (1963).

12. Le Dain, Final Report of Royal Commission on the Non-Medical Use of Drugs (1973).

13. Supra, note 1.

14. Packer, The Limits of Criminal Sanction (1968).

15. Law Reform Commission of Canada, The Limits of Criminal Law (1975);
Law Reform Commission of Canada, Our Criminal Law (1976).

16. Supra, notes 14 and 15.

17. Statistics Canada, Crime and traffic enforcement statistics, (for each year from 1975 to 1982), cat. 85-205.

18. Bertrand, Femmes et justice: problèmes de l'intervention (1983) 16 No. 2 Criminologie, 77.

Chapter 2

1. Thus, *e.g.* the law of assault might purport to protect the interest in physical safety, but when one examines the patterns of enforcement, one might see a higher priority being given to a husband's authority or the interest in maintaining marriage.

2. *Implications of Feminist Theory for the Direction of Reform of the Criminal Code*, 31 (prepared for Mr. Justice Allen Linden, President of the Law Reform Commission of Canada).

3. See, e.g., *The Criminal Law in Canadian Society* (1982), 41, pointing out the need for restraint in the use of the criminal sanction.

4. Contempt is the only common law offence. See s. 8 of the *Criminal Code*, R.S.C. 1970, c. C-34, as am.

5. S. 171(1).

6. S. 128.

7. S. 246.

8. Ss. 118 and 184. For a discussion of such offences as 'all purpose control offences, see Ericson and Baranek, *The Ordering of Justice* (1982), 68. It is stated that for most people, 'compliance was an obvious necessary element in routine dealings with the police. The persons we interviewed had a very realistic perception of the situation, including a knowledge that police authority is extensive enough to allow them to worsen a situation through more charges (e.g., 'obstruct police,' 'assault police,' 'cause a disturbance')... They knew that these charges could be laid as the functional equivalent to 'contempt of court' charge,...'(at 45).

9. Ss. 60, 62 and 63.

10. Ss. 46-57.

11. S. 214(4).

12. Ss. 64-70. See also s. 71 (unlawful drilling). One could also include in this general category Part III *Criminal Code* offences, Protecting the Administration of Law and Justice.

13. See, generally, Part VII, Offences Against Rights of Property.

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14. See, generally, Part VIII, Fraudulent Transactions Relating to Contracts and Trade.

15. See, generally, Part IX, Wilful and Forbidden Acts In Respect of Certain Property. It is interesting that cruelty to animals (ss. 402 and 403) is included as an infringement of someone's property interest.

16. See, generally, Part X, Offences Relating to Currency. These could conceivably be State-protecting offences too.

17. Ss. 38-42.

18. For statistics comparing the economic position of men and women, see Statistics Canada, Women in Canada (1985) 69-78.

19. Feminist analysis has suggested that women have been perceived as property rather than as property-owners. See Clark and Lewis, Rape: The Price of Coercive Sexuality (1977), 124.

20. 'Self-help' is defined in Black's Law Dictionary (5th ed., 1979) as '(t)aking an action in person or by a representative with legal consequences, whether the action is legal or not, for example, a 'self-help eviction' may be a landlord's removing the tenant's property from an apartment and locking the door against the tenant ....' In this context it is used to refer to women simply taking property from men, without legal assistance.

21. For a critique of the limitations of the feminist perspective generally, see Lacombe, Two Views On The Oppression of Women: The Limitations of Marxist and Radical Feminist Perspectives (1984) 6 Canadian Criminology Forum 165.

22. See Glendon, The New Family and The New Property (1981).

23. Ss. 244-246.

24. Ss. 246.1-246.3 I would include in this category sexual offences involving young people: ss. 143-158.

25. Ss. 205-211.

26. Ss. 247-250.2.

27. Ss. 389-392.
28. See, generally, ss. 233-243.

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29. Ss. 226.

30. See Part II.1 generally.

31. See Part II generally. This is not an exhaustive list, as there are also offences relating to the preservation of life (ss. 197-201) and the avoidance of bodily harm (ss. 228-232). These interests are also recognized in self-defence (ss. 34-37), duress (s. 17) and the common law defence of necessity. Some people might add the abortion offences (ss. 251-252) in this category, and indeed they are included in the Code under Part VI, Offences Against the Person and Reputation. A feminist analysis in comparison would show that these offences are a denial of women's interest in physical safety.

32. Schedule B of the Constitution Act, 1982, en. by the Canada Act, 1982 (U.K.), c. 11 (hereinafter referred to as the 'Charter').

33. Some feminists draw a distinction between sex and gender, using sex to refer to biology and gender to its cultural significance. If one appreciates the distinction, it is possible to argue for 'sex-specific gender-neutral' law reform, the gender-neutral drafting of laws which are meaningful with respect to the experience of women. In this paper, sex and gender are used interchangeably. See MacKinnon, Not a Moral Issue (1984) 2 Yale L. and Policy R. 321, 322.

34. See Part IV.1, Invasion of Privacy.

35. S. 158.

36. S. 254. Offences against conjugal rights are included in Part VI, Offences Against the Person and Reputation. This might now be justified by the fact that some of them, e.g., procuring a feigned marriage (s.256), resemble sexual assault by fraud.

37. Gordon Rose presumes that the origins of the s. 23(2) 'seem to be in the traditional position of subservience in which a wife was held by the common law.' Parties to an Offence (1982), 177. He suggests that the policy is now to preserve marital accord. These policies are not of course necessarily different.

38. For a feminist analysis of the institution of heterosexuality, see Rich, Compulsory Heterosexuality and Lesbian Existence (1980) 5 Signs 631.

39. S. 15 of the Charter is certainly capable of bearing the interpretation that distinctions based on marital status or sexual orientation are constitutionally offensive.

(Chapter 2 cont'd)

40. Ss. 281.1-281.3.

41. Ss. 261-280.

42. S. 159.

43. Ss. 60-63.

44. S. 8.

45. S. 177.

46. S. 120.

47. 195.1.

48. S. 128.

49. It is generally submitted as a theme in this review that there is a substantial female harm in knowing that at any particular time women are being beaten, raped and used to make pornography. To the extent that this is valid, and it seems to be the fundamental reason why offences against individuals are against the public interest, injury to an individual woman is harmful to all.

50. For the substantive discussion, see Chapter 5, *infra*.

51. S. 169.

52. S. 170.

53. S. 171. See also s. 172

54. S. 178.

55. S. 260.

56. Ss. 281.1-281.3.

57. Ss. 159-168.

Chapter 3

1. Schedule B of the *Constitution Act, 1982*, en. by the *Canada Act, 1982* (U.K.), c. 11 (hereinafter referred to as the *Charter*).

2. The following discussion has been largely influenced by American theorists. This is not to suggest, however, that European and United Nations equality theories are not also valuable. For a discussion of the limitations of comparative jurisprudence see McWhinney, *The Canadian*

(Chapter 3 cont'd)

Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence (1983), 61 Can. B. Rev. 55

3. (1982) 7 Women's Rights Law Reporter 175.

4. Ibid., at 180.

5. (1984), (prepared for Mr. Justice Allen Linden, President of the Law Reform Commission of Canada).

6. The acceptance has been so enthusiastic indeed that the move to gender neutrality pre-dates the coming into effect of s. 15 as mentioned infra note 7,. The connection between s. 15 and the gender neutral sexual assault provisions was explicitly made at the time. See Jean Chrétien, Minister of Justice, Parl. Debs. H.C., Vol. 124, No. 395, 20039, Aug. 4, 1982. This stands in considerable contrast to the slow progress in other areas.

7. E.g. in the Discussion Paper entitled Equality Issues in Canadian Law, issued by the Department of Justice in January, 1985, the only offence mentioned as possibly requiring reform is s. 146(1). The change to gender-neutral sexual assault offences is cited as part of the 'first steps towards removing gender discrimination from the statutory language of the Code.'

8. Thus s. 246.6 can be seen as a gender-neutral attempt to deal with women's degrading experience of being questioned about their sexual history in a rape trial. The Canadian Advisory Council on the Status of Women may have been influenced by such an analysis in their support of gender neutral language in the context of sexual assault. See the Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, May 6, 1982, Issue No. 82, 3.

9. Wolgast, Equality and the Rights of Women (1980).

10. 'The liberal insistence on viewing people as 'abstract individuals' of no determinate age, race, sex or economic class, was extremely progressive in its day - and is progressive in many contexts even today. (But) it has its drawbacks... (It) makes it easy, not only to ignore these special needs (of women, children, etc.), but even to claim that satisfying them would amount to reverse discrimination...' Jaggar, 'Human Biology in Feminist Theory: Sexual Equality Reconsidered' in Gould (ed.) Beyond Domination (1984) 26.

11. This paragraph has been based on Prof. MacKinnon's presentation on 'Equality Theories and Their Results' at

(Chapter 3 cont'd)

the National Symposium on Equality Rights, January 31, 1985. See her book, Sexual Harassment of Working Women (1979).

12. E.g. in the Minneapolis pornography by-law, the definition explicitly dealt with the subordination of women, but men could also file complaints if they could 'prove injury in the same way that a woman is injured.' For a discussion, see Duggan, Hunter and Vance, 'False Promises: Feminist Antipornography Legislation in the U.S.' in Burstyn (ed.), Women Against Censorship (1985).

13. (1984) 40 C.R. (3d) 282. This case has been appealed to the Supreme Court of Canada (File No. 18846) but has not been heard as of the date of writing.

14. Perhaps the best-known example of that may be the concept of 'reverse discrimination' spawned by liberal equality theory. In the criminal field, liberal equality theory could be used against pornography offences.

15. Thus, e.g. it is possible to combine the advantages of abandoning gender as a useful classification while framing laws which actively respond to women's specificity and subordination. An example would be pornography legislation directed at the problem of degradation of women, but including men. See Supra, Note 11.

16. R.S.C. 1970, App. III, s.1

17. (1976) W.W.D. 88 (B.C.S.C.). For other cases upholding gender specific offences, see R. v. Krenn (1975) 27 C.C.C. (2d) 168 (B.C.S.C.); R. v Ferguson 7 C.C.C. (3d) 240 (Sask. Q.B.) upholding rape; R. v. Beaulne, [ex parte Latreille], [1971] 1 O.R. 630 (H.C.) upholding the now repealed s. 164(1)(c), the 'vag. C' offence, the Court stating that not all women were affected by it, only prostitutes. Cf. R. v. Viens (1970) 10 C.R.N.S. 363 (Ont. Prov. Ct.), which had declared s. 164(1)(c) unconstitutional. There is U.S. case law upholding statutory rape: see Michael M. v. Superior Court of Sorama Country 101 St. Ct. 1200 (Cal.); one of the purposes of the law was to prevent teenage pregnancies.

18. (1985) 14 W.C.B. 227 (Ont. Dist. Ct.)

19. (1985) 14 W.C.B. 227 (N.S.C.A.)

20. (1985) 14 W.C.B. 235 (Ont. Dist. Ct.)

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21. S. 157 has so far tended to be used against male homosexuals. See, e.g, R. v. Goguen (1977) 36 C.C.C. (2d) 570 (B.C.C.A.). But the potential certainly exists for its use against lesbians. At the trial level in R. v. C. (1981) 30 Nfld. & P.E.I.R. 451 (Nfld. Dist. Ct.) a women was convicted of gross indecency for engaging in lesbian acts in bed with a seventeen year old girl. The decision was overturned on appeal without analysis: (1982) 39 Nfld. & P.E.I.R. 8 (Nfld. C.A.). Research did not reveal s. 169 being used to cover displays of affection between women in public, but that is not to say of course that it does not have a chilling effect.

22. See Bender, The Canadian Charter of Rights and Freedoms and the Unitd States Bill of Rights: A Comparison (1983) 28 McGill L.J. 811, 834.

23. Charter Equality Rights: Some General Issues and Specific Applications in British Columbia to Elections, Juries and Illegitimacy (1984) 15 U.B.C.L. R. 351.

24. R.S.C. 1970, c. I-23, ss. 3(1) and 26(6). See also Eberts, Preliminary Study: Equality Rights Under the Canadian Charter of Rights and Freedoms and The Statutes of Canada, (1983) Status of Women Canada, 102.

25. There are other offences where the accused must be male, all relating to sexual activity: ss. 146(2), 151, 152, 153, and 154. There are several where the victim must be female: ss. 166, and 167. There are also a number where the accused must be female: ss. 216, 226 and 251(2). S. 251(2), procuring an abortion, is gender-specific, but it is discussed by itself in the next section as the abortion offences generally raise special and complex equality issues.

26. As discussed in general terms in 3.2.1, supra.

27. See supra, note 16.

28. Sexual Offences Against Children, Report of the Committee on Sexual Offences Against Children, 51 (hereinafter called the 'Badgley Report (children)').

29. Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women (1971) 80 Yale L.J. 871, 958.

30. See Bertrand, Female Crime, a brief submitted to the Royal Commission on the Status of Women in Canada. Unpublished Studies, R.O. 33/89, Vol. 25, discussed in Barnhorst, Female Delinquency and the Role of Women (1978) 1 Can. J. Fam. L. 254. See also supra, note 17 et seq., and accompanying text.

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31. Cf: R. v. Lucas, supra, note 20.

32. Infanticide is discussed further in Chapter 4, infra.

33. In supra, 3.2.2.

34. Supra, note 18.

35. See ibid, at 834.

36. [1976] S.C.R. 616, 635 (emphasis added).

37. (1984) 47 O.R. (2d) 353, 392.

38. See the Report of the Committee on the Operation of the Abortion Law, (1977) (hereinafter referred to as the 'Badgley Report (abortion)').

39. Cases like Griffin v. Illinois (1956) 351 U.S. 12 relate to such things as the provision of trial transcripts for indigents.

40. (1977) 432 U.S. 464.

41. Ibid., 470-471.

42. (1983) 6 C.R.R. 210 (S.C. T.D.).

43. See ibid., 212. Note the absence of intent to discriminate protecting a provision discriminatory on its face!

44. The issue and its broader ramifications are discussed in Chapter 4, infra.

45. For an extensive feminist analysis of the importance of freedom, see Burstyn (ed.), Women Against Censorship, supra, 12.

46. See, e.g., the Canadian Advisory Council on the Status of Women, On Pornography and Prostitution, Brief Presented to The Special Committee on Pornography and Prostitution.

47. For a discussion of discrimination based on political expression see Russell, Discrimination on the Basis of Political Convictions or Beliefs (1985) 45 no. 3 R. du B.

48. See ss. 261-281.3.

49. Defamatory Libel (1984). Working Paper 35. The Working Paper does not itself use a feminist analysis, but the

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conclusions can be supported in that they would lead to the removal of a means of silencing women.

50. It should be noted, however, that the existing s. 279 protects the same interest, and thus supports the legitimacy of the concern. However, it can still be argued that, e.g., complainants of sexual harassment should not be subjected to the risk of prosecution. This might have a chilling effect in itself. Similar concerns arise with respect to contempt, edition, breach of the peace, causing a disturbance and ever hate propaganda. It is a related question, though beyond the scope of this paper, whether civil actions for defamation should be available in a form which permits them to be used for political intimidation. See Pell, The Big Chill, (1984) 177-188, for discussion of this use in the U.S.

51. Obscenity is not within the protection of the First Amendment in the U.S.: see Miller v. California (1973) 413 U.S. 15. For a discussion of whether speech is protected as a means or as an end, see Tribe, American Constitutional Law (1979). It has been held that there is no conflict between the obscenity provisions and the Canadian Bill of Rights: R. v. Prairie Schooner News Ltd. (1970) 1 C.C.C. (2d) 251 (Man. C.A.).

52. E.g. women. See e.g., Lehman v. City of Shaler Heights (1974) 418 U.S. 298.

53. It was held in Ginsberg v. New York (1968) 390 U.S. 629 that children could be protected form material where adults could not be.

54. See also in discussion on freedom of expression in Chapter 2, supra.

55. For a discussion of certainty as an aspect of legality, see Stuart, Canadian Criminal Law (1982) Carswell, Toronto, at 15-21.

56. See, e.g., the recent decision of the Federal Court of Appeal respecting the Customs Tariff Act (report not yet available).

57. As in Chase v. The Queen (1984) 40 C.R. (3d) 282, (N.B.C.A.) where touching a girl's breasts was held not to be sexual.

58. For this argument in the U.S. context, see Michelman, Welfare Rights in a Constitutional Democracy (1979) Wash. Univ. L.Q. 659.

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59. The argument that s. 7 creates positive rights to liberty and security of the person and that this opens to constitutional question such things as enforcement policies with respect to wife abuse is net out in Boyle, Sexual Assault (1984), Ch. 2. It is not repeated here for that reason and because it is of most significance with respect to enforcement of the law. It is suggested, however, that a guilding principle with respect to criminal law reform should be whether reform contributes to the achievement of a world in which women are as free as men to move around their environment and be free from physical attack.

Chapter 4

1. S. 251 of the Criminal Code, R.S.C. 1970, c. C-34, as am.

2. S. 216.

3. S.8

4. Prepared for the National Association of Women and the Law, 1982.

5. E.g. 'health' could be explicitly defined in s. 251(4)(c) to include social and economic reasons for an abortion. Eugenic considerations, rape and incest, could be added. It could be stated that it is not permitted to seek the consent of the father of the foetus of the parents of a minor. A clear distinction could be drawn between abortion and contraception and explicit reference could be made to the fact that there is no time limit.

6. This is the position taken by the Canadian Abortion Rights Action League, the National Association of Women and the Law (N.A.W.L.), the Young Women's Christian Association of Canada and the National Action Committee on the Status of Women.

7. See e.g., the resolution of the N.A.W.L. 2nd conference, Ottawa, 1977, calling for the repeal of s. 251: Manual of the National Association of Women and the Law (1981) B-201.

8. See, generally, MacKinnon, The Male ideology of Privacy: A Feminist Perspective on the Right to Abortion (1983) 17 (no 4) Radical America 23.

9. 'A good user of contraception is a bad girl.' Ibid, 25.

10. Right-Wing Women (1983), reprinted in (1983), 1 Law and Inequality 95.

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11. Statistics Canada, Therapeutic Abortions (1982) 58. U.S. data shows the risk of dying from an abortion induced in the first 15 weeks of pregnancy to be 1/7th the risk of dying from pregnancy and childbirth. Cates, Legal Abortion: The Public Record (1982) 215, 26 Science 1587.

12. Ibid., 110. The Badgley Report (abortion) also found, that complications could be decreased by abortion at an earlier stage and by the use of specialized units (at 322). See the Report of the Committee on the Operation of the Abortion Law (1977). See also Cates, Schultz, Grimes and Tyler, The Effect of Delay and Method Choice on the Risk of Abortion Morbidity (1977) 9 Family Planning Perspectives 266.

13. See supra, note 11, 69. Cf. the U.S. figures for 1980: Tietze, Induced Abortion: A Work Review (1983), 1.

14. See Grimes, Cates and Selik, Abortion Facilities and the Risk of Death (1981) 13 Family Planning Perspectives 30.

15. This occurred in Romania with a move to restructure abortion laws. See Facts on Abortion, printed by the Childbirth by Choice Trust, Toronto. See also Jaffe, Lindheim and Lee, Abortion Politics (1981), 13 et seq., 21 et seq.

16. Supra, note 12, 66-67.

17. Statistics Canada, Therapeutic Abortions (1982) 54.

18. For research documenting the negative effects of this factor, see Adler, Abortion: A Social-Psychological Perspective (1979) 35 J. of Social Issues 100. This stress is added to what is sometimes the pain and grief of having an abortion, since negative effects have been documented as well as feelings of relief. The feminist community is paying increasing attention to the negative effects, without acknowledging in any way that the State is justified in adding to them. See McDonnell, Abortion: Not an Easy Choice (1984).

19. MacKinnon, supra note 8, 29. For a discussion of the medical role in anti-abortion legislation, see Mohr, Abortion in America: The Origins and Evolutions of National Policy, 1800-1900 (1978), and Luker, Abortion and the Politics of Motherhood (1984) Ch. 2. Little has been written on the evolution of abortion law in Canada but see Collins, The Politics of Abortion:

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Trends in Canadian Fertility Policy (1982) 7 Atlantis 2, and de Valk, *Morality and Law in Canadian Politics: The Abortion Controversy* (1974).

20. See generally, MacKinnon, *supra*, note 8.

21. It may not be possible to measure, but the criminalization of behaviour which people feel they must engage in anyway, may have a detrimental effect on law-abidingness generally.

22. See Wardley, *The Abortion Privacy Doctrine: A compendium and Critique of Federal Court Abortion Cases (1980)*.

23. (1973) 410 U.S. 113.

24. (1973) 410 U.S. 179.

25. The court did, however, deny that the right to abortion was an absolute one.

26. In *Harris* v. *McRae* (1980), 100 S.Ct. 2671, the Supreme Court went on to uphold the constitutionality of the refusal to fund abortions through Medicaid. See also *Beal* v. *Doe* (1977), 432 U.S. 438, *Maher* v. *Roe* (1977), 432 U.S. 464, and *Poelker* v. *Doe* (1977), 432 U.S. 519.

27. See MacKinnon, *supra*, note 8.

28. See the Canadian position in 3.2.4, *supra*.

29. Ss. 203 and 204.

30. S. 198.

31. See s. 8 of the *Criminal Code*. Functional alternatives can, however, be found in s. 116 (disobeying a court order) and s. 127 (obstructing justice).

32. For a mainstream analysis of the need for reform, see the Law Reform Commission of Canada, *Contempt of Court*, (1982), Report 17. The astounding assertion is made that 'Canadian citizens are familiar with and understand the role of judges. They agree voluntarily to accept their decisions and rulings because judges are impartial. A litigant who loses, however unhappy he may be to have lost, will accept his lot because he will have inevitably received a decision untainted by prejudice or bias.' (at 10).

33. *Re* v. *Dalke* (1981) 21 C.R. (3d) 380 (B.C.S.C.).
34. *R.* v. *Larose* [1965] C.S. 318 (Que. S.C.).

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35. Hébert v. P.-G. Que. [1966] B.R. 197 (Que. C.A.).

36. See Hamilton rape victim plans to complain about judge's remark, Globe and Mail, Feb. 11, 1985.

37. Contempt of Court, supra, note 32, 26.

38. See, generally, Tribe, American Constitutional Law (1979),623 et seq.

39. In an Ontario rape case, the complainant was jailed for seven days for contempt because she refused to testify. She said she feared for herself and her family. See Strauss, Experts Disagree on Sentencing of Reluctant Witness, Globe and Mail, Dec. 2, 1983, and Cruickshank, Jailing of complainant sparks protest, Globe and Mail, Dec. 2, 1983. The judge threatened 12 women with contempt when they held up a banner stating 'We hold this court in contempt of women.'

40. An Ontario case which received considerable public attention was that of a young woman who was sentenced to three months in jail for refusing to testify against the father of her unborn child in an assault case. Her sentence was reduced on appeal. See Platiel, Jailed one week for refusing to testify, woman recalled, Globe and Mail, March 20, 1984.

41. In addition, it should be seriously questioned whether witnesses, particularly victims of sexual attacks, should be required to give evidence twice. Removal of the preliminary inquiry stage might well have a practical impact on this issue. See Part III, infra.

42. In a Different Voice: Women's Conceptions of Self and Morality' (1977) 47 Harvard Educational Review 481.

43. The ultimate level is the morality of non-violence. Kohlberg, on the other hand, found that males (although he applied his research to females thus finding them developmentally inferior) progress through six stages in moral development, beginning with right being identified as blind obedience to rules and ending with right as living by universal ethical principles. Males tended to fall within the fourth stage when right is associated with law and order. For a brief description of Kohlberg's work, see Golding and Laidlaw, Women and Moral Development: A Need to Care (1979-80) 10 Interchange 95.

44. In a small Ohio study it was found that there was evidence to support the hypothesis that attitudes toward law, legal institutions and moral values are associated with ascribed social sex roles. Kay, Value

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Orientations as Reflected in Expressed Attitudes are Associated with Ascribed Social Sex Roles (1969) 11 Canadian J. of Corrections 193.

45. See 2.5, *supra*.

46. As is already recognized in s.4 of the *Canada Evidence Act*, R.S.C. 1970, C. E-10, as am., and ss. 91-94 and 166-174 of Bill S-33.

47. Distinctions based on marriage are unjustifiable, but at least they have the virtue of recognizability.

48. Note also ss. 226 (neglect to obtain assistance in childbirth) and 227 (concealing body of a child).

49. S. 220. The incidence of infanticide is very small compared to other forms of killings. *E.g.*. in 1982 there was only one reported charge of infanticide laid (Statistics Canada, *Crime and Traffic Enforcement Statistics* (1982) at 2-1), while in 1984 there were only five reported cases of infanticide in Canada (*Moins d'homicides au Canada, mais pas au Québec*, Le Devoir, ler août 1985, 8).

50. S. 538(2) and (4) bars subsequent indictments. See also Chapter 14, *infra*.

51. See 2.1. and 2.3., *supra*.

52. For the view that imprisonment is not appropriate see *R.* v. *Szola* (1977) 33 C.C.C (2d) 572 (Ont. C.A.).

53. *Cf.* Law Reform Commission of Canada, *Homicide* (1984), Working Paper 33, 74-77.

54. See Part IV, *infra*.

55. See also s. 227 (concealing the body of a child.).

56. For a summary, see Schur, *Labeling Women Deviant, Gender, Stigma and Social Control* 92 *et seq.*.

57. Three midwives were charged in Halifax with criminal negligence causing death following the death of a baby after a home birth. The charges were subsequently dismissed at the preliminary hearing. See Globe and Mail, Nov. 26, 1983. A teenager in Brantford was given an absolute discharge in a manslaughter case. She left her baby to die in a toilet after giving birth: Globe and Mail, March 19, 1985. For similar cases, see Globe and Mail, Feb. 19, 1985, Dec. 11, 1982, March 26, 1982 and Oct. 17, 1982. A foetus in the process of being

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born was held to be a person for the purposes of s. 203 in R. v. Marsh (1979) 2 C.C.C. (3d) 1 (B.C. Co. Ct.).

58. See Colvin, Recklessness and Criminal Negligence (1982) 32 U.T.L.J. 345, 349-56, and Stuart, Canadian Criminal Law (1982), 176-179.

59. For the comparison, see Boyle, Sexual Assault (1984) 76-88.

60. As discussed in Chapter 2, infra, the law could move to an offence of negligent sexual assault, which would remove this inconsistency argument. It is not suggested here, however, that the way to achieve equality is to adopt one standard of culpability across the board. Standards should be established in the context of each crime, as argued by Prof. Pickard in Culpable Mistakes and Rape: Relating Mens Rea to the Crime (1980) 30 U. T.L.J. 75. It can certainly be argued that there is a public interest in promoting women's control over the birth setting but not in promoting sexual activity. The law as it stands is more generous in allowing honest mistakes in the latter context than it is in the former.

61. Just as it is not improper to rely upon one of the various feminist theories discussed in the General Introduction, Part I, supra, it is equally permissible to adopt a subjective or objective test in particular circumstances.

62. For a discussion of s. 193 see Russell, The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law (1982) 14 Ottawa L.J. 270.

63. See the Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, May 20, 1982, Issue No. 86. The Canadian Association of Elizabeth Fry Society has also called for removal of soliciting. See, ibid., issue No. 88 at 37.

64. Prostitution in Canada (1984) at 90

65. Report of the Special Committee on Pornography and Prostitution in Canada (1985). (hereinafter referred to as the 'Fraser Report').

66. Ibid., 534, 538.

67. Ibid, 538, 546-547. See also Russell, supra, note 62, 309 et seq., who argues for the complete repeal of s. 193.

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68. See the Fraser Report, ibid., 538-543, for proposals on amendments to s. 171 to make it a more effective response to the public nuisance aspects of street prostitution. It should be noted that a form of the proposed offence is causing a disturbance by the use of 'sexually offensive remarks or suggestions.' This may provide some protection for women in areas where street prostitution occurs (and indeed in other places). There is also an explicit section relating to prostitution, which would allow a prostitute (or a customer) to be charged if (s)he 'beckons to, stops or attempts to stop pedestrians or attempts to engage them in conversation.' (at 539). In effect this is a soliciting offence under another guise and would allow women to be prosecuted for being victimized in this context.

69. The reason is identified by Backhouse, quoting from Flexner, Prostitution in Europe (1914) 108:

> The professional prostitute being a social outcast may be periodically punished without disturbing the usual course of society... The man, however, is something more than a partner in an immoral act: he discharges important social and business relations, is as father or brother responsible for the maintenance of others, has commercial or industrial duties to meet. He cannot be imprisoned without deranging society.

70. See s. 179 (1), am. by 1980-81-82, c. 125, s. 11 and R. v. Obey [1973] 3 W.W.R. 382 (B.C.S.C.) cf. R. v. Patterson (1972) 19 C.R.N.S. 289 (Ont. Co. Ct.) which held that only females can be charged as all definitions of prostitutes refer to females.

71. (1978) 41 C.C.C. (2d) 31 (B.C.C.A.).

72. (1978) 4 C.R. (3d) 121 (Ont. C.A.)

73. As it would have been in Bill C-19, had it been passed into law. (Bill C-19, An Act to Amend the Criminal Code, etc., 32nd Parl., 2nd sess., 32-33 Eliz. II, 1983-1984). Cl. 48 would have added the following provision to s. 195.1: 'Prostitution includes obtaining the services a of prostitute.' See also the proposals recommended by the Standing Committee on Justice and Legal Affairs, March 1983.

74. Sexual Offences Against Children, Vol. 2, 1012-13.

75. These are discussed in Chapter 2, infra.

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76. However, for an account of how defamation actions are used in the U.S. to frighten political activists and people who complain of police brutality see Pell, The Big Chill (1984), 177-188.

77. This is because a doctrine developed to make the law more responsive to, e.g., the battered wife syndrome may become inflexible. Thus accused women may be convicted because their situation does not precisely match the situation that judges and juries have begun to understand. See Crocker, 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defence' (1985) 8 Harvard Women's L. J. 121, for an analysis of this phenomenon in the U.S. Thus what will be suggested here is not a 'battered wife's' defence, but an approach that will assist the court in examining the situation in its complete context from the perspective of the accused.

78. This would provide support for the hypothesis that actors in the the criminal justice system are engaged in 'patrolling the boundaries of the female sex role:' Chesney-Lind, 'Chivalry Re-examined: Women and the Criminal Justice System' in Bowker, Women, Crime, and the Criminal Justice System (1979) 207. Chesney-Lind refers to research which shows distinctions being made between different types of female accused (at 218).

79. Schneider, Jordan and Arguedas, (1978) 1 Fam. L.R. 118. See also Vanderbraak, Limits on the Use of Defensive Force to Prevent Intramarital Assaults' (1978-79) 10 Rutgers-Camden L.J. 643.

80. (1977) 88 Wash. 2d 221, 559 P. 2d 548.

81. Quoted by Schneider et al, supra note 79, 122.

82. See Ibid., at 121.

83. See ss. 34-37.

84. (1957) 26 C.R. 150 (Que. C.A.). The accused was male in this case.

85. See also R. v. Robertson [1954] O.W.N. 164 (C.A.) (previous exhibitions of violence and rage relevant); R. v. Cadwallader [1966] 1 C.C.C. 380 (Sask. Q.B.) (fourteen year old boy killed father under extreme stress caused over a long period of time by father's threats to kill him); R. v. Scott (1910) 15 C.C.C. (2d) 442 (Ont. H.C.) (accused acquitted where the evidence showed a history of assaults and she shot the deceased when he came towards her striking at her with a stick).

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86. (1983) 37 C.R. (3d) 198.

87. (1979) 31 N.S.R. (2d) 461 (C.A.). At the new trial, the accused pleaded guilty to manslaughter.

88. [1976] 6 W.W.R. 390 (Alta. C.A.).

89. See, e.g., R. v. Ward (1978) 4 C.R. (3d) 190 (Ont. C.A.). 'It is not correct to say as a matter of law that self-defence is justified only where there is no other reasonable means whereby a person can retreat.' (at 192).

90. E.g., R. v. Deegan (1979) 49 C.C.C. (2d) 417 (Alta. C.A.).

91. See generally, Stuart, supra, note 58, 394-402.

92. Langley and Levy, Wife Beating: The Silent Crisis (1977), point to the debilitating effects of abuse upon the victim's psyche, as does Martin, Battered Wives (1976).

93. S. 215.

94. See Boyle, 'Violence Against Wives - the Criminal Law in Retreat?' (1980) 31 N.I.L.Q. 35, 50-54.

95. R. v. Jan Mohamed, A.I.R., [1929] Lah. 861; Sornarajah, 'Commonwealth Innovations on the Law of Provocation' (1975) 24 I.C.L.Q. 184 and 'The Doctrine of Continuing Provocation' (1971) 2 J. of Ceylon Law 101; and Parker v. The Queen (1963) 111 C.L.R. 610 (Aust. H.C.) in which the court recognized the provocation could consist of a series of acts. In State v. Wanrow, supra, note 79, the court felt that a narrow time restriction wrongfully limits the inquiry to the events immediately associated with killing. See also Kieviet, The Battered Wife Syndrome: A Potential Defence to a Homicide Charge (1978-79) 6 Pepperdine L.R. 213, 226 et seq.

96. [1978] A.C. 705

97. Ibid., at 718. This test does not give credence to woman's 'frailty,' rather it suggests that the tryer of fact must recognize and understand what makes a particular woman lose control of herself.

98. [1969] S.C.R. 335, adopting the English decision in Bedder v. D.P.P. [1954] 1 W.L.R. 1119 (H.L.) which was overruled in Camplin.

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99. (1982) 2 C.C.C. (3d) 394 (Ont. C.A.)

100. Although this is inconscient with the policy urging that past sexual history should not be adduced with respect to the complainant in sexual assault cases, the main concern here that the court must be encouraged to look at women from a woman's perspective.

101. The Supreme Court of Canada, in Morgentaler (1975) 20 C.C.C. (2d) 449, tentatively recognized a restricted version of the defence: 'If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible' (at 497). In applying this to abortion it was held that there must be evidence: '(i) that the accused in good faith considered the situation so emergent that failure to terminate the pregnancy immediately could endanger life or health and (ii) that upon any reasonable view of the facts compliance with the law was impossible.' (at 500). As in the sections on abortion, it was proposed that all the abortion offences be repealed, a consideration of the shortcomings of the defence of necessity is inappropriate here. Clearly, however, if political realities are such that repeal is unlikely then a broadening and clarification of the defence would be desirable.

102. Criminal Law, The General Part: Liability and Defence (1982) Working Paper 29, 96.

103. To the extent that the State provides for basic needs then this defence would be unsuccessful.

104. S. 17 of the Criminal Code

105. Paquette v. The Queen [1977] 2 S.C.R. 189 limits s. 17 to a person who actually commits the offence and applies the common law defence to parties.

106. See, generally, Stuart, Canadian Criminal Law, supra, note 58, 383-393. For a discussion of constructive murder see Chapter 12, infra.

107. As suggested by the Law Reform Commission, supra, note 102, 87 and by analogy to the recognition in s. 246(2)(b) that threatening a third person can be seriously coercive. Section 246(2)(b) creates a second level form of sexual assault where the victim has submitted because of threats to a third party.

108. Thus the requirement that threats be sudden, presenting an agonizing choice to the accused, as in R. v. Gardner (1983), 34 C.R. (3d) 237 (B.C. Co. Ct.), should be

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reconsidered in the context of an ongoing violent relationship where a woman is without alternative shelter and adequate police protection.

109. One case worth study is that of Gamble and Nichols v. The Queen (1978) 40 C.C.C. (2d) 415 (Alta. C.A.), in which Janice Gamble was convicted of being a party to first degree murder where she had played a relatively passive role in the events. The perceptions of women like her as to why they acted in the way they did would make discussion of reform less theoretical.

110. Surprisingly, it would have been retained in a somewhat different, but still gender-specific, form, in Bill C-19, cl. 35. See *supra*, note 67.

111. It is of course possible that a child be the perpetrator rather than the victim of incest. Thus there might be a coercive relationship between a 13 year old brother and his five year old sister. Making it impossible to charge a child with incest will leave such cases to be dealt with under sexual assault and statutory rape laws. It is proposed, consistently with 2.2.5 *infra*, that incest be reconceptualized to focus on sexual relations in a relationship of dependence. To substitute for a concept an arbitrary difference in age seems artificial and may well offend s. 15 of the *Charter*.

112. See, *e.g.*, Wallach and Ruben, *The Premenstrual Syndrome and Criminal Responsibility* (1971) 19 U.C.L.A.L. Rev. 209, and Taylor and Dalton *Premenstrual Tension: A New Criminal Defence?* (1983) 19 Cal. West. L. Rev. 269.

113. (1983) 6 Criminal Justice J. 187.

Chapter 5

1. As MacKinnon puts it: 'With the rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female.' *Not a Moral Issue* (1984) 2 Yale L. & Policy R. 321, 326.

2. See Burstyn (ed.) *Women Against Censorship* (1985).

3. For doubts about the ability of the State to carry out a feminist mandate see King, 'Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better,' *Ibid*., 88.

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4. See Clark, 'Liberalism and Pornography,' in Copp and Wendell (eds.), Pornography and Censorship (1983).

5. See On Pornography and Prostitution Brief Presented to the Special Committee on Pornography and Prostitution, Canadian Advisory Council on the Status of Women, April, 1984. For a discussion of the range of feminist view see Jarvis, Whose Freedom?; Pornography, Feminism and the Law' (1983), paper prepared for Status of Women Canada.

6. Kostash, 'Second Thoughts' in Burstyn, supra, note 2, 32.

7. See Mahoney, Obscenity, Morals and the Law: A Feminist Critique (1985) 17 Ottawa L.R. 33.

8. (1985) 11 William Mitchell L. R. 41, 75-76.

9. Supra, note 1, 324.

10. Supra, note 8, 56-58.

11. Report of the Special Committee on Pornography and Prostitution in Canada, (1985) 267. For a recent critique of the Fraser Committee Report see Noonan, Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee. (1985) 45 C.R. (3d) 61.

12. Ibid. 266, 259.

13. Lewis, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue no. 12, March 3, 1978.

14. Longino, 'Pornography, Oppression and Freedom: A closer Look,' in Lederer (ed.), Take Back the Night: Women on Pornography (1982).

15. MacKinnon, supra note 1, 321. 'This definition is a slightly modified version of the one passed by the Minneapolis City Council on December 30, 1983. Minneapolis, Minn., Ordinance amending title 7, chs. 139 & 14, Minneapolis Code of Ordinances Relating to Civil Rights. The ordinance was vetoed by the Mayor, reintroduced, passed again, and vetoed again in 1984.' ibid. See, generally, Baldwin, The Sexuality of Inequality: The Minneapolis Pornography Ordinance (1984) II Law and Inequality 629. This definition has been criticized by feminists, on the basis that it

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attacks sexually-explicit material, is used by anti-feminists, adopts a male view of the private, and views sexuality as an unrelenting realm of victimization of women. See Duggan, Hunter and Vance, 'False Promises: Feminist Antipornography Legislation in the U.S.,' Burstyn, supra, note 2, 130 et seq.

16. Brief, supra, note 5, 3.

17. For the full definitions see the Fraser Report, supra note 11, 276-279, 630-631. The offences involving each tier are different.

18. For an analysis of other media images, see Steele, 'A Capital Idea: Gendering in the Mass Media,' Burstyn, supra, note 2, 58.

19. It may be easier to achieve consensus on the criminalization of violent pornography. See Clark, supra, note 4. But, the tendency to focus on pornography (and sexual assault) as violence, and not sexuality, seems to deny the reality of what sexuality is in our society.

20. The Fraser Report, supra, note 11, 276-279.

21. See R. v. Doug Rankine Co. (1983) 36 C.R. (3d) 154 (Ont. Co. Ct.): '(F)ilms which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrades and dehumanizes the people upon whom they are performed, exceed the level of community tolerance.' (at 173). See also R. v. Wagner (1985) 43 C.R. (3d) 318, together with the annotation by Noonan.

22. Sexual Offences Against Children (1984), Report of the Committee on Sexual Offences Against Children. See Chs. 47-55, and for a summary, pp. 99-103. The Report also recommends, restrictions on the access of children to pornography (at 106). This is not adopted here because of the recommendation that pornography should not be available to anyone. See also the discussion and proposals in the Fraser Report, supra, note 11, 579-590, 629-649.

23. See ss. 281.1-281.3 of the Criminal Code.

24. The Fraser Committee did not share these concerns and proposed the inclusion of 'sex' in the hate literature provisions (s. 281.1.(4)), together with other amendments designed to improve these provisions. See generally supra, note 11, Ch. 25.

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25. Schur a describes the feminist dilemma in his book *Labeling Women Deviant* (1984), 171-172.

26. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 86, May 20, 1982. The Supreme Court of Canada has struck down municipal initiatives so far: see *Westendorp* v. *The Queen* (1983) 32 C.R. (3d) 97, and Whyte, *Prostitution: Municipal Regulation and the Domain of Criminal Law Meet Again* (1983) 32 C.R. (3d) 107. This is not to say, however, that municipal by-laws clearly addressed to public nuisance rather than prostitution would not be constitutional.

27. *Prostitution in Canada* (1984) 90.

28. S. 15 of the *Charter*. See also *In re P.*, (1977) 92 Misc. 2d 62, 400 N.Y.S. 2d 455 (enforcement of prostitution statute almost exclusively against females denies equal protection).

29. Supplemented by the offence of attempting to cause a disturbance. See, *e.g.*, *R.* v. *Kennedy* (1973) 21 C.R.N.S. 251 (Ont. C.A.). It is not clear whether a disturbance must actually be caused *Poole* v. *Tomlinson* (1957) 26 C.R. 92 (Sask. Q.B.); *R.* v. *Eyre*, [1973] 2 W.W.R. 656 (B.C.S.C.); in *R.* v. *Pordridske* (1980) 23 A.R. 329 (Alta. Q.B.) it was held that drinking and shouting gross obscenities was sufficient to support a conviction) or whether it must be the case that the behaviour in question might reasonably cause a disturbance (*R.* v. *Swinimer* (1978) 25 N.S.R. (2d) 512 (C.A.)). It would seem difficult to justify the criminalization of behaviour which does not, however, in fact cause a disturbance.

30. *Supra*, note 22, Chs. 42-46.

31. *Ibid.*, 99.

32. *Ibid.*, 97.

33. *Ibid.*, 95.

34. *Ibid.*, 96.

35. As documented in the Fraser Report, *supra*, note 11, 416-419.

36. *Ibid.*, 543-546.

37. *Ibid.*, 543.

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38. Supra, note 26. Criminalization of customer behaviour was proposed to the Fraser Committee by Prof. Constance Backhouse and a group of law students from the University of Western Ontario, on the basis that the root cause of the problem was the male demand for sexual services. It was rejected as being open to challenge under s. 15 of the Charter. (See supra, note 11, 521). This illustrates very well the limitations of an approach to equality not firmly grounded in an understanding of the subordination of women.

39. For a discussion of the various harms of prostitution, including the victimizing of the prostitute, see Jennings, The Victim as Criminal: A consideration of California's Prostitution Law (1976) 64 Cal. L.R. 1235. See also Erbe Prostitutes: Victims of Men's Exploitation and Abuse (1984) II Law and Inequality 609.

40. Barry, Female Sexual Slavery (1981).

41. Heyl, 'Prostitution: An Extreme Case of Sex Stratification' in Adler and Simon (eds.), The Criminology of Deviant Women (1979).

42. Collins, A Conflict Theory of Sexual Stratification (1971) 19 Social Problems 3.

43. See, e.g. Federal/Provincial/Territorial Report on Wife Battering to the Meeting of Ministers Responsible for the Status of Women, May 28-30, 1984.

44. Ibid., 343-346. The substantive issues regarding self-defence, provocation and contempt are discussed in Chapter 4, supra. See Stallone, Decriminalization of Violence in the Home: Mediation in Wife Battering Cases (1983) II Law and Inequality 493.

45. For a summary of the effects of the Criminal Law Amendment Act, S.C. 1980-81-82, c. 125, see Boyle, Sexual Assault (1984), Ch.3.

46. E.g., Kinnon in the Report on Sexual Assault in Canada (1981), prepared for the Canadian Advisory Council on the Status of Women, suggests that pressure for reform focused on the need for sexual equality before the law, recognition of the assaultive nature of rape, and more realistic and enforceable penalties. A major impetus behind reform was the work of Lorenne Clark and Debra Lewis. See Rape: The Price of Coercive Sexuality (1977).

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47. E.g., the Toronto Area Causus of Women and the Law issued a Joint Statement on C-53, identifying some of the problems. See also MacKinnon, Not a Moral Issue supra, note 1, 343, criticizing the emphasis on rape as an act of violence, not sex.

48. Chase v. The Queen (1984) 40 C.R. (3d) 282, 13 C.C.C. (3d) 187. Leave to appeal to S.C.C. granted: 41 C.R. (3d) xxiv.

49. (1985) 44 C.R. (3d) 254 (Ont. C.A.).

50. (1985) 44 C.R. (3d) 263 (Alta. C.A.)

51. Chase was also not followed in R. v. Ramos (1984) 42 C.R. (3d) 370 (N.W.T. Terr. Ct.) (test should be one of common sense and basic societal values in our society; breasts intimately connected with sex) and Gardynik v. The Queen (1984) 42 C.R. (3d) 362 (Ont. Co. Ct.) (breasts a patent sexual symbol).

52. R. v. Lang, as yet unreported, judgment delivered 22nd October, 1984.

53. R. v. Thorne (1984) 13 W.C.B. 261 (Ont. Co. Ct.).

54. There may well be differing lesbian and heterosexual perspectives.

55. This is obviously a much broader issue, but in this particular manifestation it provides an excellent example. There are many areas of law where male and female perspectives may tend to diverge. To date, judicial appointments have meant that we have tended to choose the male perspective. It is vital in the long term that many more women be appointed to the Bench and that existing judges undergo continuing education on such issues as the meaning of 'sexual.'

56. E.g., in the Joint Statement on Bill C-53, issued by the Toronto Area Caucus of Women and the Law, it was stated: 'At a minimum, the jury must be instructed that the defence of 'honest belief' must be based on honest and reasonable grounds, and that a mere 'honest belief' is not a sufficient defence. N.B.: We say 'minimum' because some if not most of us think that there should be no defence of 'honest belief' at all.' It is even possible to find individual feminists who accept the approach adopted in Pappajohn v. The Queen (1980) 2 S.C.R. 120. See the evidence of Lorenne Clark in Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue no. 91, June 6, 1982.

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57. Ibid..

58. See, however, the decision in R. v. Sansregret (1983) 37 C.R. (3d) 45 (Man. C.A.), in which Matas J.A. seemed to reject the applicability of the defence where the accused terrorized the victim prior to her pretence of consent. This is a very difficult case from which to abstract any principle as the reasoning is obscure and the decision seems to reject the findings of fact at trial.

59. For a review, see Boyle, supra, note 45, 76-88.

60. Culpable Mistakes and Rape: Relating Mens Rea to the Crime (1980) 30 U.T.L.J. 75 and Culpable Mistakes and Rape: Harsh Words on Pappajohn (1980) 30 U.T.L.J. 415.

61. Punishment and Responsibility: Essays in the Philosophy of Law (1968), 154. This is very similar to the approach advocated by Prof. Pickard.

62. See The Australian Aftermath of D.P.P. v. Morgan (1977) 25 Chitty's L.J. 289, 296.

63. See Pickard, supra, note 60.

64. I.e. where the victim submitted to a sexual touching. It would have no relevance with respect to the injury caused where she did not submit or where she was required to tolerate abusive working conditions not involving touching.

65. See Boyle, supra, note 45, 69-71.

66. See, e.g., on assault, R. v. Barron (1984) 39 C.R. (3d) 379 (Ont. H.C.), in which it was held that the victim had implicitly consented to teenage horseplay. Mr. Justice Ewaschuk seemed to make it difficult to establish absence of consent, given the evidence of the 'usual pushing and shoving indulged in by young teenagers'.

67. S. 146 of the Criminal Code.

68. S. 150.

69. S. 151.

70. S. 152.

71. S. 153.

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72. S. 154.

73. S. 166.

74. S. 167.

75. S. 168.

76. Either against men or as against themselves. E.g., the Alberta Court of Appeal has stated that such offences protect young women and girls against themselves: R. v. Wiberg (1955) 22 C.R. 321. If so, they are restrictions on sexual autonomy masquerading as protection.

77. The Law Reform Commission has adopted something like this approach in its proposal of an offence of sexual interference due to dependency. See Report on Sexual Offences (1978), 22.

78. See, generally, Backhouse and Cohen, The Secret Oppression: Sexual Harassment of Working Women (1978).

79. See, e.g. the position of the National Action Committee and the Vancouver Coalition for a Non-Sexist Criminal Code, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 91, June 6, 1982.

80. They are summarized in the Report at 46-48.

81. See supra, note 27, et seq., Ch. 3, and accompanying text.

82. E.g., the new s. 167(2)(d), proposed by Bill C-53 (1st sess., 32nd Parl., 29 Eliz.II, 1980-81), would have simply introduced new wording, allowing the accused a defence if he established that he was 'less responsible than the complainant for the sexual misconduct that took place.'

83. See Lahey, Implications of Feminist Theory for the Direction of Reform of the Criminal Code, (1984), commenting on the proposal of the Law Reform Commission: 'The decriminalization of 'adult' incest is particularly tragic for women who are over eighteen, because they now have even less power to break free of such relationships as they mature. At least the threat of going to the police gives adult women some power in incestuous relationships;...' (at 62; emphasis in original). The Law Reform Commission of Canada has, however, recommended that s.150 be reported, while retaining some provision for control of incestious relationships. See Law Reform Commission of Canada, Report on Sexual Offences (1978), 25 et seq.

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84. Incest, a paper presented at a conference entitled 'The Changing Law of Sexual Assault,' Faculty of Law, Dalhousie University, January 1982.

85. As a point of clarification, it is not imagined that judges should simply be educated about different perspectives on this issues. This is only one of many areas where judges should become sensitized to the possible limitations of their perspective.

Chapter 6

1. It is particularly important to seek out various feminist analyses, as there is unlikely to be consensus, particularly since the following list might be perceived to be based on the idea of women as virtuous, loving and nurturing, not just with respect to other adults and children but the whole universe.

2. See Freeman, The Rights of Children in the International Year of the Child (1980) 33 Current Legal Problems 1. He suggests that a contributory factor in child abuse is our cultural acceptance of corporal punishment (at 8).

3. See s. 244(1)(a), and generally Stuart, Canadian Criminal Law (1982), 457-468.

4. See, *e.g.*, Llewellyn and Hoebel's description of the 'slightly vague edges of Cheyenne 'private property in chattels in the face of a non-possessor's want or need', in The Cheyenne Way (1961), 226 *et seq*. It is stated that 'there seems to have been no real legal mechanism for handling petty thieves' (at 227).

5. See s. 190 for government lotteries.

6. See, *e.g.*, Boyle, Home Rule for Women: Power-Sharing Between Men and Women (1983) Dalhousie L.J. 790.

Chapter 7

1. See Foreword, *supra*, note 3, and accompanying text.

2. Schedule B of the Constitution Act, 1982, en. by the Canada Act, 1982 (U.K.), c.11 (hereinafter referred to as the 'Charter').

Chapter 8

1. Quoted in Whitely, Jurisdiction in Criminal Law (1985), 223.

2. R.S.C. 1970, ch. C-34, as am.

3. The foundations of constitutionality of Canadian law are ss. 91 and 92 of the Constitution Act, 1867, (U.K.) 30-31 Vict. c.3, and the Charter.

4. This is discussed more fully in Part II, supra.

5. There are a few cases where the so-called Pre-Menstrual Stress (PMS) syndrome has been successfully pleaded to diminish criminal responsibility for homicide, e.g. the cases of Sadie Craddock (1979) and Christine English (1980) in Britain, and Shirley Santos (1982) in the U.S. (Brooklyn, New York). See Norris, PMS (1981) 269-288; Dalton, Once a Month (1983), 203-215. Gloria Steinem's humourous essay, 'If Men Could Menstruate' (in Outrageous Acts and Everyday Rebellions (1983) 337) brilliantly illustrates some of the political considerations which may accompany the reluctance to incorporate the P.M.S. 'defence' into the jurisprudence. See also Ch. 9, infra, notes 7 and 16, and accompanying text.

6. One can mark the popular acceptance of this notion from the publication of Susan Brownmiller's Against Our Will, in 1971.

7. Provincial evidence acts require corroboration for women's testimony in prosecution for such offences as breach of promise of marriage, and seduction. The Criminal Code has specifically abrogated the requirement of corroboration in sexual assault cases. See 11.5 infra.

8. Canada Evidence Act, R.S.C. 1970, ch. E-10, s. 4.

9. For examples under s. 195 see R. v. Murphy and Bieneck (1981) 60 C.C.C. (2d) 1 (Alta. C.A.).

10. E.g. the 'Vagrancy C' offence (formerly s. 175 (1) (c)) was repealed in 1972. Formerly in some provinces soliciting only related to women, while in others men could also be charged.

Chapter 9

1. Schedule B of the Constitution Act, 1982, en. by the Canada Act, 1982 (U.K.), c. 11 (hereinafter referred to the 'Charter').

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2. *Canadian Bill of Rights*, R.S.C. 1970, App. III, as am. ss. 2(a) and (b).

3. *Canada Evidence Act*, R.S.C. 1970, ch. E-10, s.5.

4. *Bill of Rights*, *supra*, note 2, s. 1(a).

5. (1981) 450 U.S. 464.

6. The *Charter* s. 15 has been applied to overrule s. 146, which creates an offence for male having sexual intercourse with certain young women, but not females with young men: *R.* v. *Lucas* (1985) 14 W.C.B. 235 (Ont. Dist. Ct.). This analysis could defeat the application of ss. 216 or 543(2)(b), if ever they were used and seen to disadvantage the accused.

7. See Ch. 8, *supra* note 5 and *infra*, note 16, and accompanying text.

8. Siggins, *Brian and the Boys* (1985) at 27.

9. The controversial Minnesota enactment created a cause of action for damages occasioned by the 'injury' caused by viewing pornographic material on the racks of corner stores, movie marquis, *etc.*: Ordinance of the City of Minneapolis, amending title 7, ch. 139, *Minneapolis Code of Ordinance Relating to Civil Rights in General* (1983).

10. See the judicial interpretation of freedom of expression, and reasonable limits to it, in *R.* v. *Ramsingh* (1984) 14 C.C.C. (3d) 230 (Man. Q.B.); *R.* v. *Red Hot Video Ltd.* (1984) 11 C.C.C. (3d) 389 (B.C. Co. Ct.); *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors* (1983) 34 C.R. (3d) 73, (Ont. Div. Ct.), *app'd* (1984) 38 C.R. (3d) 271 (Ont. C.A.).

11. See Ch. 3.2.4 and Ch. 4.2.1, *supra*.

12. See, *e.g.*, *Borowski* v. *A.G. Canada and Minister of Finance* (1983) 8 C.C.C. (3d) 392 (Sask. Q.B.).

13. See Part I, Chapter 3, *supra*.

14. See *R.* v. *Diabo* (1974), 27 C.C.C. (2d) 411 (Que. C.A.) - jury array challenged by native accused on basis that no natives on valuation role from which panel was produced. - appeal dismissed: exclusion on basis of geography, not race.
    R. v. *LaForte* (1975), 25 C.C.C. (2d) 75 (Man. C.A.) - jury array challenged because of few women and natives properly dismissed - no evidence of misconduct by Sheriff.

(Chapter 9 cont'd)

15. R.S.C. 1970, c. E-10, as am.; infra, Ch. 11.3.

16. R. v. Saxell (1980), 59 C.C.C. (2d) 176 (Ont. C.A.).

17. But see Ch. 4.2.3 and 4.4.5, supra.

Chapter 10

1. Criminal Code, ss. 455, 455.3, 723, 724.

2. R.S.O. 1980, c. 107, s. 12(b). This provision appears to be unique in Canada. See also s. 12(d).

3. McLeod, Victim Non Cooperation in the Prosecution of Domestic Assault (1983) 21 Criminology 395.

4. See Lewis, Rape: The Price of Coersive Sexuality (1977); Baril, Cousineau and Gravel, Quand les femmes sont victimes, quand les hommes appliquent la loi (1983) 16 Criminologie 89; McLeod, ibid.

5. Between 40 - 50% of all homicides happen within family, half of which are interspousal: Chimbos, 'Marital Violence: A Study of Husband-Wife Homicide,' in K. Ishwaren (ed.) The Canadian Family (rev'd ed., 1976).

6. Criminal Code, s. 745.

7. See R. v. Chohan (1969) 5 C.R.N.S. 30 (B.C.S.C.); McKenzie v. Martin [1954] S.C.R. 361, 108 C.C.C. 305.

8. S. 472.

9. S. 457 (2)(d).

10. S. 457 (7)(b).

11. See Visher, Gender, Police Arrest Decisions, and Notions of Chivalry (1983) 21 Criminology 5; Barnhorst, Female Delinquency and the Role of Women (1978) Can. J. Fam. L. 254.

12. See Dowson v. The Queen (1983) 7 C.C.C. (3d) 527 (S.C.C.); Armstrong and Chasse, The Right to an Independent Prosecutor (1974) 28 C.R.N.S. 160.

13. Law Reform Commission of Canada, Disclosure by the Prosecution (1984), Report 22. An empirical study on preliminary hearings yielded the statistics that of 7,219 cases polled, 30% had preliminary hearings: evidence was called in only 46% of cases where hearings were held. A guilty plea was entered in 71% of cases where the accused was committed for trial (at 11).

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14. R. v. Williams, April 1, 1982 (Ont. Prov. Ct.) per Dnieper J.

15. R. v. X. (1983) 43 O.R. (2d) 685 (Ont. H.C.J.) per Linden J.

16. Ibid., at 689.

17. Ibid.

Chapter 11

1. R.S.C. 1970, ch. E-10, as am. (hereinafter refered to as C.E.A.).

2. R.S.C. 1970, ch. C-34, as am. (hereinafter refered to as Cr. C.).

3. Cross on Evidence, (5th ed., 1979), 236.

4. MacCrimmon, Consistent Statement of a Witness (1979), 17 Osgoode Hall L.J. 285.

5. R. v. Lillyman (1896) 2 L.R. 167; R. v. Osborne [1905] 1 K.B. 551 (C.C.R.); Thomas v. The Queen [1952] 2 S.C.R. 344; R. v. Kulak (1979) 46 C.C.C. (2d) 30 (Ont. C.A.).

6. Timm v. The Queen [1981] 2 S.C.R. 315.

7. R. v. Kistendey (1975) 29 C.C.C. (2d) 382 (Ont. C.A.). R. v. Boyce (1974) 28 C.R.N.S. 336 (Ont. C.A.).

8. S.C. 1980-81-82-83, ch. 125 (Bill C-127).

9. With the amendment proposed in Bill C-53, An Act to amend the Criminal Code in relation to sexual offences ..., 1st session, 32nd Parl., 29 Eliz. II, 1980-81.

10. Offences involving consent of lack thereof. See Cross on Evidence, 5th ed., (1979) 212. Cf MacCrimmon, supra, note 4, who states that the rule also applies to offences of non-sexual violence.

11. Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, Report on Evidence (1982), 302.

12. Watt, The New Offences Agains the Person: The Provisions of Bill C-127 (1984) 164-214. To demonstrate the incongruity of such a restriction, the author cites as an example an indictment on a charge of incest and one on a charge of sexual assault; the rule would be applied in one case and abolished in the order.

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13. Boyle, Sexual Assault (1984), 152.

14. See Dawson, The Abrogation of Recent Complaint: Where Do We Stand Now? (1985) 27 Crim. L. Q. 57.

15. Fortin Preuve Pénale (1984) ed. Thémis, 493.

16. Watt, supra, note 12, 187.

17. Fortin, supra, note 15; Watt, supra, note 16.

18. Ibid..

19. This was the conclusion reached in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence concerning the impact of abolition of the doctrine of recent complaint; supra, note 11.

20. (1984) 40 C.R. (3d) 84 (Ont. H.C.)

21. (1983) 36 C.R. (3d) 281 (N.S. Co. Ct.).

22. (1984) 13 W.C.B. 134 (B.C.S.C.).

23. R. v. Temple (1984) 12 W.C.B. 71 (Ont. Co. Ct.).

24. Supra, note 11, ss. 118 and 120.

25. Supra, note 9.

26. Bill S-33, Uniform Evidence Act, 18 November 1982.

27. Supra, note 20.

28. Nelson, An Experimental Study Concerning Jury Decisions in Rape Trials (1978) 1 C.R. (3d) 265.

29. Hoskyn v. Metropolitan Police Commissioner [1978] 2 All E.R. 136.

30. (1980) 12 C.R. (3d) 193 (Ont. C.A.). See also R. v. Fellichle (1980) 12 C.R. (3d) 207 (B.C.S.C.); R. v. Marchand (1980) 55 C.C.C. (2d) 77 (N.S.C.A.).

31. R. v. Morrisson (1984) 11 W.C.B. 294 (Ont. Co. Ct.); R. v. Sillars (1978) 12 C.R. (3d) 202 (B.C.C.A.).

32. Supra, note 26.

33. Experience has show that women are more often called to testify for or against their husbands than husbands for or against their wives.

(Chapter 11 cont'd)

34. *Supra*, note 11, 281.

35. *Trammel* v. *U.S.* (1980) 445 U.S. 40.

36. The Criminal Law Revision Committee of England and the South Australian Criminal Law and Penal Methods Reform Committee favour making the spouse a competent witness.

37. Law Reform Commission of Canada, *Report on Evidence* (1975). See s.54.

38. *Ibid*, 100.

39. *Supra*, note 11, 292.

40. Delisle, *Evidence: Principle and Problems* (1984).

41. 8 *Wigmore on Evidence,* s. 2333.

42. *Gosselin* v. *The Queen* (1903) 33 S.C.R. 255; *R.* v. *Kotapski* (1981) 66 C.C.C. (2d) 78 (Que. S.C.).

43. The privelege with respect to marital communications requires a valid marriage and therefore does not apply to common law spouses. See *R.* v. *Coffin* (1954) 19 C.R. 222 (Que. Q.B.).

44. *R.* v. *Kanester* (1966) 4 C.C.C. 231 (B.C.C.A.)

45. *R.* v. *St-Jean* (1976) 34 C.R.N.S. 378 (Que. C.A.).

46. *Supra*, note 26, ss. 166-173.

47. Ss. 167-168.

48. S. 169.

49. S. 170.

50. S. 172.

51. S. 173.

52. *Supra*, note 11, 461-462.

53. *Report on the Law of Evidence* (1976) 141.

54. *Eleventh Report, Evidence* (General), Cmmd. 4991 (1972)

55. 8 *Wigmore on Evidence*, s. 2228.

(Chapter 11 cont'd)

56. At the same time recognizing that the marital privilege is mutual.

57. Supra, note 37.

58. The offences for which corroboration is currently required are rather uncommon (e.g., perjury, s. 123; treason, s.47(2); forgery, ss. 324, 195 and 256). The testimony of accomplices and children must be corroborated. At one time, corroboration was also required in cases of sexual assault; this rule has since been repealed (s. 246.4). The rule has been mitigated for testimony from an accomplice; see Vetrovec v. The Queen (1982) 27 C.R. (3d) 304 (SCC).

59. I.e., the capacity of observation, the capacity of recollection, and the capacity of communication.

60. C.E.A. s. 16(2) and Cr. C. s. 586.

61. Case law has led to the development of this rule of practice requiring the judge to warn the jury of the danger of convicting on the evidence of a child if this evidence is not corroborated. See R. v. Campbell [1956] 2 Q.B. 432; Kendall v. The Queen [1962] S.C.R. 469.

62. In R. v. Heaney, Hachborn, J. concluded that corroboration is required for all types of testimony from a child (July 11, 1985, Ont. Prov. Ct.) not reported.

63. 3 Wigmore on Evidence (1940, 3d ed.) s. 924a, 459.

64. S. 586.

65. Supra, note 15.

66. Supra, note 26.

67. We should point out that this section may cause problems since it could lead to resurrection of the rule in cases of sexual offences (s. 246.4 Cr. C.). This needs to be clarified.

68. It must be remembered that the Bill retains the oath.

69. Report of the Committee on Sexual Offences Against Children and Youth (1984), recommendation no. 19, 69.

70. S. 142 Cr.C., S.C. 1974-75-76, ch. 93, s. 8.

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71. Forsythe v. The Queen (1981) 19 C.R. (3d) 261, 53 C.C.C. (2d) 225 (S.C.C.).

72. S.C. 1980-81-82-83, ch. 125, s. 6.

73. Ss. 246.6(2) and (3) were designed to overrule the Forsythe decision, supra, note 71. We should also mention that s. 246.6, which deals with sexual activity, applies to cases of sexual assault and therefore does not necessarily extend to other sexual offences.

74. See Boyle, supra, note 3; Watt, supra, note 12.

75. Boyle, supra, note 13.

76. Watt, supra, note 12.

77. Parker, The 'New' Sexual Offences, (1983) 31 C.R. (3d) 317.

78. See Boyle, supra, note 13. In such cases, because the evidence is introduced by the Crown, surprises can be avoided and the victim will know what to expect.

79. Fortin, supra, note 15.

80. Supra, note 13.

81. The former section 142 was more specific and avoided any element of surprise for the victim. See Boyle, supra, note 13.

82. Schedule B of the Constitution Act, 1982, en. by the Canada Act, 1982 (U.K.) c.11.

83. Watt, supra, note 12.

84. This section was designed to overrule the Supreme Court decision in Forsythe.

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